The Arbitration Journal

STANDARDS FOR ARBITRATION STATUTE

DRAFT ARBITRATION ACT

ARBITRATION VERSUS LITIGATION

JAPAN-AMERICAN TRADE ARBITRATION

FRENCH LABOR ARBITRATION

REVIEW OF COURT DECISIONS

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THE ARBITRATION JOURNAL

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Some General Standards for a State Arbitration Statute

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The growing use of arbitration which is evidenced in both the commercial and labor fields and the increase in teaching arbitration throughout the country, has brought to the fore the question of reviewing the present arbitration laws and bringing them into conformity with the modern principles and practice of arbitration. The question recurs as to what should go into a state arbitration statute. What provisions should it contain? This question, in turn, invites at least another, namely, what should be the objectives of an arbitration statute? It is somewhat easier to make general answer to the latter question than the first one.

The existing arbitration statutes of American jurisdictions, both the older statutes and the more modern statutes, indicate the common purpose to facilitate the use of arbitration thereunder. Courts have frequently recognized and voiced this as the purpose of the statutes.

In almost all jurisdictions the local statute is held not to displace common law arbitration, but instead, to enable the parties, by following the statute, to obviate some of the disadvantages of common law arbitration. Existing arbitration statutes generally contain provisions concerning three general aspects of the arbitral process as follows: (1) Provision that an arbitration agreement which qualifies under the statute shall be irrevocable contrary to the common law tradition that arbitration agreements are revocable by action until award rendered; (2) provisions relating to the initiation and conduct of the arbitral hearing, requirement that the arbitral board accord the parties opportunity for full and fair hearing, and authority to the board to subpoena witnesses and evidence; (3) provisions for the enforcement of awards by motion proceedings seeking the confirmation of the award and entry of judgment thereon. Such proceedings are likely to be more expeditious than the bringing of an action or suit to enforce a common law award. Also provided are motion proceedings to vacate, or to modify and correct, an award for causes which are stated in the statute, and the causes so stated tend to be a codification of common law causes to impeach a common law award.

These motion proceedings, likewise, may be more expeditious than equity suit to vacate or correct an award.

A brief review of some of the details of these provisions may be the best way of indicating some of the "don'ts" for a state arbitration statute.

The older statutes tend to prescribe a miscellany of formalities and technical recitals to qualify an arbitration agreement thereunder. In some cases the statute fashions the arbitral process after an amicable action whereby the parties shall file their agreement with a court or a clerk thereof; and it may even provide that the arbitration shall be had according to the law governing civil actions in the courts.

Some of the older statutes, and some of the more modern ones, are restricted to the arbitration of such controversies as may be made the subject of an action, or of a personal action. Several statutes of both classes exclude controversies over titles in fee of real estate.

Some of the older, and some of the more modern, statutes also require, expressly or indirectly, that the arbitrators shall decide according to "the law applicable to the facts" and that arbitrations and awards shall be subject to judicial review and invalidation for "errors of law."

Some of the older statutes, and some of the more modern ones, purport to give a statutory award the "effect of a verdict." Such provisions may induce the courts to enter upon judicial review of the arbitration and award as upon a verdict in a civil case.

Some of the older statutes, and some of the more modern ones, prescribe a miscellany of formalities and recitals to be followed by the arbitrators in the execution of their award. Provisions appear in some of the older statutes that the arbitrators, in accomplishing their award, shall separately state their findings of fact and conclusions of law like referees. In several statutes arbitrators are required to accomplish their award with the formalities of a deed to be recorded—although it seems clear that the award is not going to be recorded as a deed, or be used for any other comparable purpose.

In short, the formalities, recitals and technicalities imposed by some of the older statutes, and by some of the more modern ones, with respect to (1) the accomplishment of a qualifying arbitration agreement, (2) with respect to the conduct of the hearing, and (3) with respect to the accomplishment of the award are unknown and not required at common law. Provisions for judicial review upon alleged "errors of law" likewise are alien to common law. And it is not apparent in any case how those statutory prescriptions assure, or con-

tribute to, the integrity of the arbitral process, nor how they serve any substantial purpose of the given statute.

Fortunately, the courts of some jurisdictions have identified at least some of these technicalities as "merely directory" and have ruled that the parties can waive them without forfeiting the more expeditious statutory proceedings for enforcing a valid statutory award. In such cases, the question naturally occurs, if such provisions are "merely directory" and the parties may waive them, what useful purpose do they serve? As measured by common law requirements, they are superfluous; and clearly they do not simplify or facilitate the arbitral process.

It also should be added that the older arbitration statutes are limited to agreements of submission of existing controversies; they do not cover provisions to arbitrate disputes which may arise between the parties in the future. Accordingly, future disputes provisions in commercial contracts and in collective bargaining agreements in current usage are outside the statute and in most of those jurisdictions cannot qualify under the given statute. Any possibility of their potential qualification under a statute is further removed in jurisdiction where the statute fashions a statutory arbitration after an amicable action or otherwise loads the submission agreement with technical recitals and formalities which are predicated upon an existing controversy as some of the statutes prescribe.

From this background, it seems easier to pose positively the more desirable standards of a state arbitration statute, taking account of the current use of provisions to arbitrate future disputes in commercial contracts and collective bargaining agreements as well as agreements of submission of existing disputes as follows:

(1) That the statute should embrace both agreements to arbitrate future controversies whether justiciable or not and agreements of submission of existing controversies whether justiciable or not;

(2) That no more formalities should be imposed to qualify such agreements under the statute than that they shall be in writing;

(3) That the statute should declare that such arbitration agreements shall be irrevocable and enforceable to overcome common law tradition that arbitration agreements are revocable prior to award and unenforceable specifically;

(4) That this general declaratory objective of the statute should be implemented with remedies precisely tailored to overcome common law revocability and non-enforceability as follows:

(a) Motion proceedings to obtain an order of stay of trial of

any action or suit brought in any court of the state upon a cause embraced in an arbitration agreement qualifying under the statute. Thus can common law revocability by action be overcome.

(b) Motion proceedings on short notice to obtain a general order against a recalcitrant party to a qualifying arbitration agreement that he proceed in compliance with his agreement. Thus is there likelihood that common law non-enforceability will be overcome; that the party will honor his undertaking to arbitrate.

(c) Further, and in particular assurance of right under the agreement, enable a party by motion on short notice to obtain court appointment of the original arbitral board when the recalcitrant party fails or refuses to participate in the selection thereof according to the arbitration agreement, or in filling a vacancy which may otherwise occur.

It should also be made explicit that these motions shall be tried by a court designated in the statute and that the issues shall be confined to a decision upon the scope of the given arbitration agreement (the controversies covered thereby) and its validity as to the party against whom the relief is sought. Judgments upon such motions should be identified as final enough to support appeal.

(5) That the arbitral board should be required to give reasonable notice to the parties of the time and place of the hearing and to accord the parties full opportunity to present their respective sides of the matter in issue to the arbitrators in due quorum. The board, or any member thereof, should have authority to subpoena witnesses and evidence on behalf of any party; and, upon due notice of time and place of hearing, the arbitral board should have authority to proceed with the hearing and render an award upon the evidence as presented, even though a recalcitrant party refuses to appear.

(6) While ex parte hearing and award would be authorized as indicated above, it may prove only a pyrrhic victory for the party who does appear and wins an award. Its enforcement may be defeated, or it may be affirmatively attacked by proceedings to vacate, on the ground that the arbitration agreement was not valid as to the attacking party. In such proceedings, it will be necessary to establish that the arbitration agreement was valid as to the objecting party and that it covered the cause as determined by the arbitrators. This challenge is available in such cases in addition to the other usual grounds of impeachment of arbitrations and awards.

In order to obviate these particular *post mortems* on the making and validity of the arbitration agreement, it seems desirable to pro-

vide anticipatory procedures whereby these matters as to the validity and scope of the arbitration agreement may be resolved before the arbitral proceedings are had. These procedures have been successfully added to the New York statute. Provision is made whereby the party who desires to arbitrate may serve short notice of *intention to arbitrate* upon the adverse party. The notice should fully identify the alleged arbitration agreement, the cause at issue thereunder, the desire to settle it by arbitration and further details as to time and place of the intended arbitration. Unless the adverse party shall move the court to enjoin (to stay) the arbitration within a time stated, issues as to the validity of the agreement and its scope are foreclosed and may not be raised thereafter.

(7) Formalities for the award should, it seems, be few indeed. An award in writing signed by a majority should be adequate unless the parties shall have stipulated more.

(8) Motion proceedings to confirm the award and for entry of a confirming judgment or decree which will support execution and appeal may prove more expeditious than enforcement by common law action.

(9) Motion proceedings to vacate or to modify and correct also probably will be more expeditious than equity suit to vacate or correct. Judgments thereon also should sustain appeal.

(10) In making qualifying arbitration agreements irrevocable and enforceable as contemplated above, there may be doubt as to the availability of provisional remedies. If a party becomes apprehensive, after controversy has arisen under a future disputes provision, or after an agreement of submission has been accomplished, that the other party may remove or hide his assets to defeat recovery upon an award against him, may he, can he, safely take any action to preserve the status quo pending the arbitration and award? It seems feasible expressly to provide that he may, by motion to the court otherwise having jurisdiction to enforce the agreement, on short notice, apply for such order or decree and for the issuance of such process as the court may find necessary and proper to protect the rights of the moving party pending arbitration and the award and to secure the satisfaction thereof.

(11) Experience has proved that perplexing problems may arise under such an arbitration statute as is here contemplated when one party is a non-resident of the state. It seems expedient, in order to resolve various points of potential litigation to follow recent additions to the New York statute. It seems desirable, in line with these ad-

ditions, for the statute to provide that, when a party enters into an arbitration agreement qualifying under the statute which further stipulates therein that any arbitration thereunder shall be held within the state and pursuant to the statute thereof, written notices by mail to the non-resident shall be sufficient, respectively, to authorize the motion proceedings to enforce the arbitration agreement, to constitute notice of intention to arbitrate as therein provided and to authorize the motion proceedings to confirm the award.

General. It will be recognized that the foregoing outline of the standards for a general arbitration statute follows to considerable extent the *general pattern* of the existing arbitration statutes of California, Connecticut, Hawaii, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Wisconsin, and the United States arbitration statute. That general pattern first appeared in the New York Arbitration Law of 1920.

It should be emphasized that only the *general pattern* is being commended. There are details in the provisions of some of those statutes that seem unworthy of being included, and there are some provisions which are included in some of those statutes that should, it is believed, be included in the others. Tested by the foregoing general standards these provisions may be readily checked.

And, quite clearly, (and some of the courts have so observed) some of those statutes reflect less faithfully than should be the virtues of simplicity and precision of draftsmanship.

Provisions for grievance procedure and arbitration in collective bargaining agreements. There is considerable variation in the foregoing arbitration statutes concerning provisions for grievance procedure and arbitration in collective bargaining agreements. Some of the statutes exclude them; some do not; one (New York) expressly includes them. Some have dubious exceptions such as that the statute shall not apply to arbitration provisions in contracts for "personal service" or in "contracts of employment."

It is difficult to evaluate these variations otherwise than by posing a misunderstanding as to the significance of an arbitration statute of the general pattern under consideration. By common law tradition parties are helpless by any stipulations on their part to overcome revocability and non-enforceability of arbitration agreements. By the enactment of a statute of the pattern at hand parties gain a choice: Parties may accomplish an arbitration agreement qualifying under the statute and gain the remedies thereof for overcoming revocability and

non-enforceability. Or, they may accomplish the same formal agreement but stipulate further, that the statute shall not apply, (or, of course, they may accomplish a non-conforming agreement), and thereby reserve traditional revocability and non-enforceability. It is not clear why parties to collective bargaining agreements as well as parties to general commercial contracts should not have like choice with respect to arbitration provisions therein. It is not clear why provisions for arbitration in collective bargaining agreements should be excluded from the statute.

Draft of an Arbitration Act

As recommended by the Arbitration Law Committee of the American Arbitration Association

The New York Arbitration Law of 1920 reversed the ancient doctrine of revocation of arbitration agreements and provided for the specific enforcement of future arbitration clauses. The Act has been followed, with variations, by several states, among them New Jersey, Connecticut, Massachusetts, Ohio, Washington, and by the Federal Arbitration Act of 1925, which had been endorsed by the American Bar Association.

The Uniform Arbitration Law, however, which was prepared by the Commissioners on Uniform State Laws in 1924, and which was adopted in Nevada (1925), Utah (1927), Wyoming (1927) and North Carolina (1927), failed to make enforceable agreements to arbitrate future disputes. Later, a new draft of a State Arbitration Law was prepared by the American Arbitration Association and published in *The Arbitration Journal,* vol. 6 (1942), p. 301. In view of the war situation, no further action was taken.

To promote the consideration of modern arbitration statutes, John G. Jackson, the Chairman of the Arbitration Law Committee of the American Arbitration Association, established a Subcommittee of which John K. Watson became Chairman. Its members are M. Herbert Syme (Philadelphia, Pennsylvania), Paul Carrington (Dallas, Texas), S. D. L. Jackson, Jr. (Cleveland, Ohio), Thomas L. Parsonnet (Newark, New Jersey), Harry H. Platt (Detroit, Michigan), Charles B. Rugg (Boston, Massachusetts), Quincy Wright (Chicago, Illinois), and the following New York lawyers: Robert Bruce, Edmond B. Butler, Sidney Cohn, Herman Cooper, Isadore Katz, Meyer Kurz, Henry Mayer, H. H. Nordlinger, Lionel Popkin, Ludwig Teller and Burton A. Zorn.

The Subcommitte has considered a revised Draft of an Arbitration Act which might serve as a basis for discussions with Bar Association Committees and other interested bodies in various states in order to create more general interest in the improvement of the respective state arbitration laws. The Draft published below has endeavored in the interests of simplicity and clarity to hold closely to the bare fundamentals of a workable, modern statute and leaves many refine-

ments and elaborations for consideration in the light of the specific needs and policies of the respective States.

Comments and suggestions are invited by the Arbitration Law Committee of the American Arbitration Association.

DRAFT OF AN ARBITRATION ACT

As Recommended by the Arbitration Law Committee of the American Arbitration Association

AGREEMENT OF PARTIES

Section 1 Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the submission, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement or out of the failure or refusal to perform the whole or any part thereof. Such agreement without regard to the justiciable character of the controversy, shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The provisions of this Act shall apply to any arbitration agreement between employers and employees or between associations of employers and of employees, including but not restricted to controversies dealing with rates of payment, wages, hours of employment, or other terms and conditions of employment, unless such agreement specifically provides that it shall not be subject to the provisions of this Act.

DEFINITION OF COURT AND METHOD OF HEARING APPLICATIONS

Section 2 The term "court" when used in this Act means a court having jurisdiction of the parties and of the subject matter.

Any application made under this Act shall be made in writing and heard in the manner and upon the notice provided by law or rules of court for the making and hearing of applications, except as otherwise herein expressly provided.

STAY OF PROCEEDING IN COURT

Section 3 If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate,

the court in which such action or proceeding is pending, upon being satisfied that any issue involved in such action or proceeding is referable to arbitration under such agreement, shall, on application of any party to the arbitration agreement, stay all proceedings in the action or proceeding until such arbitration has been in accordance with the agreement, or, if the issues are severable, may in its discretion stay such portion of such action or proceeding so referable, notwithstanding the provisional remedies available pursuant to section 14.

REMEDY IN CASE OF DEFAULT

Section 4 1. The making of a contract or submission for arbitration described in section 1, providing for arbitration in this State, shall be deemed a consent that any court having jurisdiction over the controversy shall have authority to enforce such contract or submission and to enter judgment on an award thereon.

2. A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the court for an order directing the parties to proceed with the arbitration in accordance with their agreement. . . . days notice in writing of such application shall be served upon the party alleged to be in default. Service thereof shall be made in the manner provided by law for service of a summons in an action in the court specified in Section 2. If the court is satisfied after hearing the parties that no substantial issue exists as to the existence or validity of the agreement to arbitrate the court shall make an order directing the parties to proceed to arbitrate in accordance with the terms of the agreement.

3. If the court shall find that a substantial issue is raised as to the existence or validity of the arbitration agreement, the court shall proceed immediately to the trial of such issue. If upon such trial the court finds that no valid written agreement providing for arbitration was made, the motion to compel arbitration shall be denied.

4. Either party shall have the right to demand the immediate trial by jury of any such issue concerning the validity or existence of the arbitration agreement. Such demand shall be made before the return day of the application to compel arbitration under this section, or if no such application was made, the demand

shall be made in the application for a stay of the arbitration, as provided under paragraph "5(a)" hereunder.

5. In order to raise an issue as to the existence or validity of the arbitration agreement, a party must set forth evidentiary facts raising such issue and must either

(a) make an application for a stay of the arbitration. If a notice of intention to arbitrate has been served as provided in Section 6 hereof, notice of the application for the stay must be served within ____ days after service of said notice.

Any issue regarding the validity or existence of the agreement shall be tried in the same manner as provided in paragraph "3" and "4" hereunder; or

(b) contest an application to compel arbitration as provided under paragraph "2" hereunder.

APPOINTMENT OF ARBITRATORS BY THE COURT

Section 5 Upon the application of any party to the arbitration agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator, or arbitrators, in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been duly appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate.

INITIATION OF PROCEEDING

Section 6 When the controversy arises from a written agreement containing a provision to settle by arbitration a controversy thereafter arising between the parties out of or in relation to such agreement, the party demanding arbitration may serve upon the other party, personally or by registered mail, a written notice of his intention to arbitrate. Such notice must state in substance

that unless within _____ days after its service, the party served therewith shall serve a notice of an application to stay the arbitration, he shall thereafter be barred from putting in issue the existence or validity of the agreement.

TIME AND PLACE OF HEARINGS

Section 7 The arbitrators shall appoint a time and place for the hearing and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not later than the date fixed for making the award.

All the arbitrators shall meet and act together during the hearing but a majority of them may determine any question and render a final award. The court shall have power to direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

FAILURE TO APPEAR

Section 8 If after the commencement of the first meeting and before final award, an arbitrator shall for any reason cease to act as such, a majority of the arbitrators originally appointed, if there be more than one, may determine any question and render a final award.

If any party neglects to appear before the arbitrators after reasonable notice of the time and place of hearing, the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them.

TIME AWARD MADE

Section 9 If the time within which the award shall be made is not fixed in the arbitration agreement, the award shall be made within ____ days from the closing of the hearing. Any award made after the lapse of such ____ days shall have no legal effect, unless the parties extend in writing the time in which said award may be made or ratify any award made after the expiration of the ____ day period.

REPRESENTATION BY ATTORNEY

Section 10 Any party shall have the right to be represented by an attorney in any arbitration proceeding or any hearing before the arbitrators.

POWER OF ARBITRATORS

Section 11 The arbitrators, or a majority of them, may require any person to attend as a witness, and to bring with him any book, record, document or other evidence.

The fees for such attendance shall be the same as the fees of witnesses in the _____ (insert appropriate court).

Subpoenae shall issue and be signed by the arbitrators or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenae to testify before a court of record in this State. If any person so summoned to testify shall refuse or neglect to obey such subpoenae, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State.

DEPOSITIONS

Section 12 Depositions of parties or witnesses may be taken with or without a commission in the same manner and upon the same grounds as provided by law for the taking of depositions in suits pending in the courts of record in this State.

FEES AND EXPENSES OF ARBITRATORS

Section 13 Unless it is otherwise expressly provided in the agreement to arbitrate, the award may require the payment, by either party, of the arbitrators' expenses and fees, not exceeding the fees allowed to a like number of referees in the _____ court; and other expenses incurred in the conduct of the arbitration.

ORDER OF COURT BEFORE FINAL DETERMINATION

Section 14 At any time before final determination of the arbitration the court may upon application of a party to the agreement to arbitrate make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award.

AWARD

Section 15 The award shall be in writing and signed by the arbitrators or by a majority of them. The arbitrators shall promptly upon its rendition transmit a true copy of the award to each of the parties or their attorneys.

ORDER CONFIRMING AWARD

Section 16 At any time within one year after the award is made, any party to the arbitration may apply to the court for an order confirming the award, which the court shall grant unless the award is vacated, modified, or corrected (as provided in sections 17 and 18). Notice in writing of the application must be served upon the adverse party, or his attorney, . . . days before the hearing thereof. Such notice shall be made in the manner prescribed by law for the service of notice in an action. The validity of an award, otherwise valid, shall not be affected by the fact that no application is made to confirm it.

ORDER VACATING AWARD

Section 17 Upon the application of any party to the arbitration in any of the following cases the court shall, after notice, make an order vacating the award:

(a) Where the award was procured by corruption, fraud or other undue means.

(b) Where there was evident partiality or corruption in any of the arbitrators.

(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

(e) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in Section 6, or serving an application to compel arbitration, as provided in Section 4, paragraph 2.

An award shall not be vacated upon any of the grounds set forth above, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.

Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agree-

ment for the selection of the original arbitrators. Any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration.

ORDER MODIFYING AWARD

Section 18 Upon the application of any party to the arbitration in any of the following cases, the court shall, after notice, make an order modifying or correcting the award:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them not affecting the merits of the decision upon the issues submitted.

(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order shall modify and correct the award, so as to effect the intent thereof.

NOTICE OF APPLICATION TO VACATE, MODIFY OR CORRECT

Section 19 Notice of an application to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after a copy of the award is delivered to the party or his attorney. Such application shall be made in the manner prescribed by law for the service of notice in an action. For the purposes of the application any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of application, staying any proceedings to enforce the award.

ENTRY OF JUDGMENT ON AN AWARD

Section 20 Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. Costs of the application and of the proceedings subsequent thereto, not exceeding ____ dollars and disbursements, may be awarded by the court in its discretion.

JUDGMENT-ROLL

Section 21 Immediately after entering judgment, the clerk shall attach together and file such of the following papers, as may be on file in his office, which shall constitute the judgment roll.

1. The agreement and each written extension of the time within which to make the award.
2. The award.
3. Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application.
4. A copy of the judgment.

The judgment may be docketed as if it were rendered in an action.

EFFECT OF JUDGMENT AND ENFORCEMENT

Section 22 The judgment so entered shall have the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

APPEALS

Section 23 An appeal may be taken from any order made in a proceeding under this act, or from a judgment entered upon an award in the same manner and to the same extent as from orders or judgments in any other action.

REPEAL OF OTHER ACTS

Section 24 In so far as the provisions of this Act are inconsistent with the provisions of any other statute, act or part thereof, the provisions of this Act shall control. No repeal of any other statute or act or part of any statute or act consistent herewith shall be affected by the terms hereof, but this Act shall be cumulative of any other such acts or statutes.

SEPARABILITY

Section 25 Notwithstanding any other evidence of legislative intent, it is hereby declared to be the controlling legislative intent that if any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

The Operation of Tripartite Agencies in Labor-Management Relations

At a joint meeting of the American Political Science Association and the Industrial Relations Research Association held in Buffalo, New York, on August 28, 1952, the Operation of Tripartite Agencies in Labor-Management Relations was the subject of one of the important panel groups. The Arbitration Journal presents the two following papers of views pro and con, as expressed by leaders of the panel, over which Professor Edward W. Carter of the University of Pennsylvania presided. It is realized that neither of the points of view have been exhaustively stated and there is much opportunity for further discussion. The papers are herewith presented solely for the consideration which they deserve and comment from any of the readers for the benefit of further explanation in an aspect of ever growing importance in the settlement of industrial disputes.

Vincent P. Ahearn

Executive Secretary, National Sand and Gravel Association
Formerly Industry Member of the National War Labor Board

The tripartite system does not contribute to good labor-management relationships. Tripartite government is alien to our Constitutional society. The advocates of tripartite government are noticeably less diligent in calling for application of the tripartite system to the normal functions of labor and management. There is little support for using a tripartite agency for the reconciliation of grievances arising under the language employed in labor agreements. Voluntary arbitration of grievances has been most successful where the single impartial arbitrator is used. Labor and managment groups presently using the single arbitrator seem unprepared to entertain any suggestion that a tripartite agency be substituted.

I have never understood the basis for the argument that when two parties disagree about the meaning of language in a contract, they should resort to an arbitration tribunal, two-thirds of whose members have an admittedly partisan interest in the disagreement. On its face, this seems an absurd arrangement. It is a compliment to the good judgment of labor and management that the tripartite system for final adjudication of disputes is the object of growing disfavor. How could it be otherwise when the impartial member of the tripartite tribunal, the man who is expected to render a judicial deci-

sion in a spirit of complete detachment, must turn to one of the two representatives of the contending parties in order to obtain a majority decision? This kind of compulsion is bound to demoralize the peaceful settlement of disputes and to subject the neutral member to the humiliation of making a deal on many occasions when a clear-cut decision is necessary for the orderly conduct of labor-management relationships.

Many experienced arbitrators selected by the parties to settle the terms of a new contract have found to their dismay that tripartite arbitration makes sound conclusions impossible. The same requirement for compromising with one of the two contending parties is almost inevitable. If labor and management have agreed that specific issues are incapable of peaceful reconciliation and that therefore, in the public interest, arbitration is desirable, there is at once a strong element of contradiction when the arbitration is turned over to a board principally composed of the people who found it impossible to agree.

Arbitration of the terms of a new contract is a growing practice in the field of public utilities. Men who are selected by the parties or appointed by the government in these cases to serve as the so-called impartial member of the arbitration agency, have often had the experience of being forced to compromise what they sincerely believed to be the right solution in order to get a majority decision. This compulsion to compromise has degraded the whole system of voluntary arbitration and unless there is wider acceptance of an arbitration tribunal composed entirely of representatives of the public interest, voluntary arbitration will be discredited and governmental dictation substituted.

The American Arbitration Association has expressed its concern about the use of tripartite boards in deciding labor disputes. The Association warned that the necessity for obtaining support from one side of the controversy has stripped the neutral member of his impartiality and has subjected him to duress from the partisans. If his decision is a reflection of this coercion (and this is unavoidable in most cases), the majority decision will be resisted in advance by one of the two parties who are expected to live together peacefully after the controversy has been settled. Good relations under these circumstances can never exist.

One suggestion for overcoming the objections to tripartite determination is to create an arbitration tribunal consisting of three neutral members plus one member each from labor and management, thus permitting the majority to reach a decision without the concurrence

of either partisan. This is an improvement over the three-man tripartite arbitration board, but one of the considerations which is causing labor and management to reject arbitration is that it is often too expensive. An arbitration board composed of three neutral members will cost more money than most employers and unions can afford.

Furthermore, appointment of a five-man board to get around the objections to tripartite arbitration seems to be a ponderous and clumsy remedy. I should like to express at this point my personal opinion that the whole system of arbitration is in need of serious re-appraisal. It sometimes costs a great deal more than the parties can afford, and I detect a disconcerting practice in government of appointing arbitrators from a relatively limited panel. When arbitrators must be brought across the country and paid a fee plus travelling expenses, the arbitration process will become unpopular, whatever its merits as a principle of civilized behavior.

We must develop a larger panel of competent arbitrators, and surely we have enough talent in this country, in every state, to localize the selection of arbitrators in most cases. Labor and management must also re-appraise their own arbitration policies. I deplore the reckless abuse of power by labor and management to bring about the summary dismissal of an arbitrator simply because his decision in a specific case is unpopular. There is an additional point that personal pride frequently leads to the use of arbitration in cases where an honorable compromise is obviously a more effective, a quicker, and less expensive method of the conduct of labor-management relationships.

Why should it be assumed that tripartite government will be a success despite the almost overwhelming evidence that tripartite methods for the settlement of labor disputes are rejected by management, by labor and by the groups from which our arbitrators are generally drawn? Three arguments are made for tripartite determination of wage stabilization policies and for governmental settlement of labor disputes during national emergencies: the first is that the public members need the expert advice and counsel of men who have had practical experience in labor and management, obtainable only through a tripartite board; the second argument is that employers and employees in the United States will be more reconciled to decisions of tripartite boards because of the knowledge that, after all, management and labor are represented on the board; and the third claim for a tripartite board is that it is an expression of the democratic process when "representatives of the public, of labor and of management have

equal power and equal responsibility, reflected in their equal numbers and their equal voting rights."

This point of view was advanced by the Wage Stabilization Board on June 27, 1951, but it has fundamental weaknesses. I can express only the point of view of my own industry, but we reject any notion that our industry is "represented" on the Board. No so-called management member of that Board has any authority to act in our behalf or to commit us in any way. I believe that it is the almost universal attitude in American business that the management members of the Board, past or present, speak only for themselves and have no ambassadorial status.

There is no documentation for the argument that there will be a greater acceptance by labor and management of decisions of tripartite boards. If this were a valid claim, it could be made with equal force for voluntary tripartite boards for the reconciliation of disputes between labor and management. American employers are just as unhappy over a bad decision of a tripartite board as they would be over a bad decision of an all-public board; but they have the instinct for accepting decisions of government made after scrupulous observance of due process requirements.

Employers will be much more inclined to accept the decision if it is made under procedures which are basic to our Constitutional society. It is alien to the American tradition to have decisions made by a board whose members do not conceal their partisan interest and their allegiance to a point of view which may be, and often is, in sharp conflict with the general welfare. All of us have had the experience of observing some of the public hearings conducted by the War Labor Board and the Wage Stabilization Board. Labor and management members, in possession of two-thirds of the voting power of the Board, make no effort in these public exhibitions to conceal their devotion to a private interest, and the shouting and disorder and violent partisanship are a shock to those who believe that government should represent all of the people and not class interests.

We have an established method for giving quasi-judicial agencies the benefit of expert opinion and advice. This is done through open hearings conducted for the purpose. We follow the same practice in our courts and in our legislatures. I really think that the weakest argument for tripartite boards is that they afford an avenue for giving public members information which is otherwise unavailable. In a word, that is simply not so. If there is any validity to this claim for tripartite boards, it would be equally logical to apply tripartite gov-

ernment across-the-board. We would have, for example, an Interstate Commerce Commission composed of equal representation of railroads, shippers and the public. Congress would be made up of bloc representation. Special interests would have a Constitutional claim to voting power, and the courts themselves would consist of judges appointed by each litigant, with proportionate representation of the public. Nobody in his right mind would propose our appropriating so much from the totalitarian system, and yet it is a sober fact that tripartite government stands on the threshold of national socialism. Tripartite boards are a menace to our institutions; we must see them in their full perspective.

Labor and management as such have no vested right to public office. No order of the United States Government should be signed by a private individual. Public boards should be composed of members who represent only the public interest and not any partisan interest. It is a distressing reality that we still have a Wage Stabilization Board two-thirds of whose members do not represent the public, who have the power to prescribe regulations which the ordinary citizen must observe if he is not to be exposed to criminal and civil punishment. There is a wider realization now than there was two years ago of this departure from time-honored methods of governing the United States. I am encouraged to believe that the present Wage Stabilization Board represents the dying gasp of a system of government which is repugnant to our free society.

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At the outset, it seems sensible to narrow the subject matter under discussion. Frankly, my concern is primarily with tripartite-ism as practiced in public agencies, tripartite-ism as it is resorted to during emergency, war or defense periods, when the Government's intervention in economic life and its desire to minimize labor disputes makes normal collective bargaining impossible. I think it must be obvious that, so far as private arbitration is concerned, no very hard and fast rules can be laid down on the question of tripartite-ism. The parties to a labor-management dispute will, by and large, be better able to judge when their needs can be met best by a single arbitrator or by a tripartite board.

I have heard a number of arbitrators cite instances where one type or the other might be superior. In determining the terms of a new

contract, for example, many arbitrators believe a tripartite board is virtually indispensable. In cases involving highly technical questions, a tripartite board frequently has greater advantages. Recently, I can recall one arbitrator describing a job evaluation case wherein he was saved from a disastrous decision which he would have made out of his partial ignorance of the intricate workings of this particular wage scheme. He was saved because he was able to consult, in true confidence, with the labor member of this tripartite board, who quickly pointed out to him how erroneously he had been proceeding. I do not mean to imply that tripartite-ism is necessarily advantageous in private arbitration. Indeed, I do suppose that one can cite considerably more experience, so far as arbitration under an agreement is concerned, to support the single-member type, but I believe that if talk of voluntarism is to be anything more than lip service, we must in the last analysis depend upon the good sense and judgment of the parties in choosing between single or tripartite arbitration arrangements.

Turning to the area of government agencies and government intervention in labor-management relations, we are confronted with entirely different problems. In the first place, let it be clear that no important group advocates or desires to bring the Government into labor-management disputes in tripartite or any other form. On the other hand, it is perfectly obvious that in a national emergency crisis, the Government is willy-nilly drawn into this sphere of activity. The need to impose economic controls and the need to minimize labor disputes impinges upon normal labor-management relations and forces Government to face the issue of what type of agency is best adapted to these crisis times.

It is at this point that tripartite-ism has evolved as a substitute device for some phases of normal labor-management relations—an extension, if you will, of collective bargaining. Thus, tripartite-ism in public agencies such as the War Labor Board, or more currently, the Wage Stabilization Board, is simply not comparable to the type of private arbitration of direct interest to the American Arbitration Association. Once you understand this point, then any simple or easy comparison with arbitration disappears. Yet, this is frequently misunderstood. Note, for example, Mr. Ahearn's statement that "the advocates of tripartite government are noticeably less diligent in calling for application of the tripartite system to the normal functions of labor and management." This very statement shows his failure to understand the essence of tripartite-ism as we have known

it in its important forms during World War II and in the post-Korea emergency. It is precisely because labor-management relations were not normal during these years that tripartite-ism was devised.

Why substitute a device such as a tripartite board, which inevitably encourages the tugging and hauling, which some management spokesmen deplore? Well, if one believes that collective bargaining decisions—for after all, this is what is involved when a goverment agency intervenes in a labor case—are better made by a single, judicial type of approach and board, then he would naturally reject tripartite-ism. If, however, one believes that the essence of collective bargaining is tugging and hauling, and the application of one pressure group against another, with decisions resulting in compromises, then he must agree that tripartite-ism is at least a fair emergency substitute for normal collective bargaining—certainly, a better substitute than a purely judicial or executive approach.

Incidentally, it is easy to see why many management spokesmen might prefer the single, executive type of approach to these decisions. In the sphere of personnel relationships, the tradition of clear-cut decisions being handed down by top executives is a long-standing one, of course. The development of trade unions and the extension of collective bargaining is designed precisely to check, single-handed, shall we say, arbitrary type of executive decisions in the field of labor-management relations. The growth of unionism sets up buffers, pressures, interest groups, and the like, in the path of simple management decisions. The essence of collective bargaining is the tugging, hauling and pushing and pulling when it comes to settling basic decisions regarding wages, hours and working conditions. It is not surprising, therefore, that the union more readily or more normally accepts tripartite-ism and all that goes with it during emergency periods.

It is interesting that Mr. Ahearn feels that under tripartite-ism, the "compulsion to compromise has degraded the whole system of voluntary arbitration." It is just this compulsion to compromise, to give and take, which labor unions believe must be preserved if anything like normal labor-management relations are to prevail during an emergency. If, on the other hand, one believes that it is better to trust these critical decisions to public bureaucrats solely, then he must reject tripartite-ism. Many of the very management groups who in the past have spoken vociferously against the power of government administrators to make life and death economic decisions, here seem to be determined to hand off all the decision-making to the same types

of administrators. The management cries resound queerly—"all power to the public members."

Personally, I am much impressed by the fact that the most distinguished public servants in this field—George Taylor, William Davis, Nathan Feinsinger, and others—all appear to be convinced that a government wage stabilization program during an emergency must be founded upon tripartite-ism. I know it has become fashionable in some circles to denounce these "so-called public members" as special-interest advocates, and I am not suggesting that they are infallible, but I certainly feel great weight must be given to their wisdom and experience.

I shall not bother to elaborate here on the more traditional reasons that are usually cited in defense of tripartite-ism in public agencies during emergency periods. These include, of course, the support which this device gives to voluntarism (the high degree of acceptance of decisions during World War II was remarkable), the avenue it provides for public members to consult with labor and management, and the tendency of tripartite-ism to keep ultimate decisions within realistic bounds. I should note that these reasons and others have been well presented in a very fine study by Dr. William McPherson.*

In summation, let me say that so far as private arbitration is concerned, the good sense and judgment of the parties to any given dispute or contractual relationship must determine the form it shall take. So far as public intervention in labor disputes is concerned, when it occurs on an important scale during an emergency period, tripartite-ism has been proven to be a generally workable substitute for some phases of normal collective bargaining.

* *Problems and Policies of Dispute, Settlement and Wage Stabilization During World War II,* Bulletin No. 1009, U. S. Dept. of Labor, 1950, Chapter VI.

Arbitration Versus Litigation

Judge Stanley Mosk

*of the Superior Court of the County of Los Angeles, California**

In this "Mid-Century Appraisal of Arbitration," neither arbitration nor traditional courtroom trials have anything to fear from the other; both have a constructive place in our commercial society. I do hope with some measure of adequacy to fulfill the unique role of an officer of the courtroom trial system, one sincerely devoted to the traditional American judicial process, recognizing the need for and usefulness of modern arbitration techniques. Since this recognition is of somewhat recent origin, much of my presentation may seem elementary to those who have had years of experience in the field of arbitration. But like most converts, I am eager to save others.

If, in their attitudes toward each other, arbitration and the legal profession have made mistakes and misjudgments in the past, we might well remember Justice Cardozo's words in his *Nature of the Judicial Process:* "* * * ever in the making, as law develops through the centuries, is this new faith which silently and steadily effaces our mistakes and eccentricities. I sometimes think that we worry ourselves overmuch about the enduring consequences of our errors. They may work a little confusion for a time. In the end, they will be modified or corrected or their teachings ignored. The future takes care of such things. In the endless process of testing and retesting, there is a constant rejection of the dross, and a constant retention of whatever is pure and sound and fine."

Most of us have considered arbitration to be a new device for the settlement of disputes, a gimmick out of this twentieth century, the mad age of hot rods and cold wars. However, some legal historians like William Seagle, in his *The History of Law,* suggest that arbitration actually may have been the origin of courts. The theory is that disputants first voluntarily submitted their quarrels to arbitration, and when this procedure had become sufficiently regular, were compelled to do so; that at this point the court, which thus developed out

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of arbitration, came into existence. He points out that arbitration existed in very simple and primitive societies, by a chief, a go-between, elders, relatives, friends, or bystanders. Among the ancient Greeks, in civil suits the dispute was first required to be submitted to arbitration, although this was only preliminary to the assumption of jurisdiction by the courts. The biblical Hebrew judge was enjoined to "attempt to compromise before proceeding to judgment," and so was the Babylonian judge before him. Frances Kellor, one of the real leaders in the arbitration field in America, traces it back to the trade guilds and trade fairs in the pre-industrial-revolution period in England. The earliest American origins seem to be with the Dutch in 17th century New Amsterdam.

At early common law a bargain to arbitrate either an existing or a possible future dispute was not illegal, but could not be specifically enforced, and only nominal damages were recoverable for its breach. Nor was any bargain to arbitrate a bar to an action on the original claim (*Restatement of the Law of Contracts,* Vol. II, page 1055). The reluctance of courts to enforce arbitration contracts is said to date back to a dictum attributed to Lord Coke in 1609 (17 Cal. Law Review 643). The reasons given were both that an arbitration agreement tends to oust the courts of jurisdiction, and that such an agreement is in its very nature unenforceable by a court of equity because it calls for personal service and for a series of acts. Though frequently criticized, the Coke dictum was generally respected in England until a statute providing for specific performance of arbitration agreements was enacted in 1889.

In the United States, the English cases were followed until the New York Act of 1920. This act has served as a pattern for the commercial arbitration statutes of other states, among them New Jersey (1923), Massachusetts (1925), Hawaii (1925), Oregon (1925), Pennsylvania (1927), and California in 1927. The pioneering New York State law of 1920 was held constitutional in 1921 (*Berkovitz v. Arbib,* 230 N.Y. 261, 130 N.E. 288). The Federal Arbitration Act became effective in 1926.

Although California previously had several code sections on the subject of arbitration (old C.C.P. 1281–1290), it may not be contended that this state had any provisions of law encouraging to arbitration until 1927. Prior to that time, an executory agreement to arbitrate was unenforceable. It could not be pleaded in bar of an action, and would not support a motion to stay proceedings (*Blodgett Co. v. Bebe Co.,* 190 Cal. 665). It would support an action for dam-

ages for its breach, but damages were limited to the amount spent in preparing for the arbitration. The agreement could not be specifically enforced. When the agreement had been executed, however, the award was final and conclusive, and upon it a suit could be brought.

It is difficult to isolate the rationale behind the early reluctance of courts to compel adherence to arbitration agreements. Some theorized that arbitrators were agents, and that their authority could be revoked at will. Others maintained that arbitration was contrary to public policy, since its practice tended to oust the legally constituted courts of their jurisdiction. This latter contention, which sounds suspiciously like that of the old time rural justice of the peace who countenanced a speed trap in his community because his salary was a percentage of the fines assessed, was discussed quite frankly in the 1923 case of *Blodgett v. Bebe Co.*, 190 Cal. 665, at 667: "It was early settled in the jurisprudence of this state, in conformity with that of practically all the states, that an agreement between parties to a contract to arbitrate all disputes thereafter to arise thereunder is invalid and unenforceable, as constituting an attempt to oust the legally constituted courts of their jurisdiction and to set up private tribunals. . . . Judges and commentators have ascribed the origin of the rule to the jealousy of courts in the matter of their power and jurisdiction and have been somewhat inclined to criticize it on that ground. Another and better ground assigned for it is that citizens ought not to be permitted or encouraged to deprive themselves of the protection of the courts by referring to the arbitrament of private persons or tribunals, in no way qualified by training or experience to pass upon them, questions affecting their legal rights. Whatever may be the true origin of the rule, it is very generally established, and there can be no doubt that it prevails in California."

Despite the lack of encouragement of arbitration in early California law, prior to the 1927 amendments, a survey made for the California Law Review (15 Cal. Law Review 289) indicated that over thirty substantial trade associations in California regularly practiced arbitration as part of their functions in furthering the interests of the members and the trade. As stated in the law review discussion, "the survey indicated that business opinion and practice solidly favored the settlement of commercial disputes by arbitration and in no case did any businessman or organization voice an objection to its use as an integral element in the business process. In the production, sale and distribution of staples and raw products, in the building trade, motion

picture industry, real estate and many other branches of industry and business, arbitration has come to be recognized as an important element in the contractual relation."

During consideration of legislative recognition of arbitration, numerous fine academic discussions were written. Many of the conflicting viewpoints were difficult to gainsay. Most of the objections by legal traditionalists to statutory sanctions for arbitration were expressed rather effectively by Philip G. Phillips, in 46 Harvard Law Review 1258. The title of his article tells his story: "The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding." If there must be resort to courts for the ultimate enforcement of arbitration awards, Phillips argues, we have the paradox of "helping an allegedly friendly proceeding by unfriendly court enforcement."

Nowhere have I seen the case for arbitration better stated than by an eminent jurist, Justice Jerome Frank, in his book *Courts on Trial:* "There is a category of disputes for which the courts seem poorly designed: When two businessmen dispute about a breach of a contract, often neither of them wants vindication, or to assuage a feeling of injustice. What they may want is a speedy, sensible readjustment of their relations, so that they can resume or maintain their usual mutual business transactions. Because of the difficulties of precise ascertainment by a court of the actual past facts out of which their dispute arose, it may well be that the best mode of settling it is not a court decision in a lawsuit but arbitration in which the disputants agree to abide by the decision of the arbitrators.

"Since, generally speaking, arbitrators are not bound to apply legal rules, the fact that, increasingly, businessmen resort to arbitration throws some doubt on the conventional notion that precise legal rules are primarily needed in the realm of business, that they supply a certainty and stability which men of business must have, that 'the commercial world' demands such rules 'because no one . . . engages in complex commercial undertakings trusting to' decisions resting on uncertain exercise of 'discretion.' Paradoxically, arbitration, with its freedom to disregard the legal rules, seems to function best in dealing with business disputes and not with those disputes which arise from angry personal feelings—where, on the whole, legal certainty has been said to be as of far less importance. One suggested explanation of this paradox is that businessmen who arbitrate have less interest in the legal rules than in the customs of their trade, which they feel will receive more attention from arbitrators acquainted

with those trade customs than from the courts. When businessmen choose arbitration, in part, they do so because court trials often involve more delay and expense; because of the exclusionary rules employed by courts which often shut out important evidence in trials; because juries are too much swayed by prejudice; and because, in many arbitrations, the arbitrators are men well acquainted with the usages of the particular trade or business of the disputants."

As heretofore mentioned, arbitration existed at common law long before it received statutory sanction. It was recognized in California in the very earliest reported cases (*Young v. Starkey,* 1 Cal. 426; *Muldrow v. Norris,* 2 Cal. 74). But even since the enactment of the 1927 statute, it is still possible to have a common-law arbitration in California, and, for that matter, in every state (5 Cal. Jur. 2d p. 78). The basic differences between common-law and statutory arbitration are those involving enforceability and revocation of agreements to arbitrate, and the entry of the award as a court judgment. For example, the court will not specifically enforce a common-law arbitration agreement, whether it pertains to existing or to future disputes. And either party to a common-law submission may revoke it before an award is made. The statute, on the other hand, expressly provides that agreements to arbitrate existing disputes or future disputes arising out of existing contracts are enforceable and irrevocable (C.C.P. 1280). Again, at common law an award is not entered as a judgment and the ordinary mode of enforcing it is by an action (*Gunter v. Sanchez,* 1 Cal. 45). But under a statutory proceeding an award may be entered as a judgment (C.C.P. 1291).

There are a number of other significant distinctions. Under the common law, an agreement to arbitrate may be oral (*Dugan v. Phillips,* 77 Cal. App. 268), whereas the statute applies only to written agreements (C.C.P. 1280–82; *Cockrill v. Murphis,* 68 Cal. App. 2d 184). At common law a party may bring an action on his dispute despite his refusal to arbitrate. But under the code a court will stay such an action until arbitration has been had in accordance with the terms of the agreement (C.C.P. 1284). And if no arbitrator is selected, at common law, the agreement becomes a nullity, whereas under statutory procedure the court is authorized to appoint an arbitrator (C.C.P. 1283). The statute empowers an arbitrator to issue depositions and subpoena witnesses, and requires that documents be produced at a hearing, but there is no such procedure at common law. Also, the statute gives the right to have an award vacated for gross error, and to have it modified or corrected for miscalculation

or imperfection, by a motion made in the proceeding, which remedies are not available against a common law award (*Dore v. Southern Pac.*, 163 Cal. 182).

Although many differences exist, the two methods have an important requirement in common: there must be a substantial compliance, at common law with the terms of the agreement of submission (*Christenson v. Cudahy Packing Co..*, 198 Cal. 685) and under statutory procedure with the terms of the statute (*Ryan v. Dougherty*, 30 Cal. 218). However, it is possible for a proceeding which fails as a statutory arbitration to be given effect as a common-law arbitration, where it is clearly indicated to be the intention of the parties (*Kreiss v. Hotaling*, 96 Cal. 617; 5 Cal. Jur. (2d) p. 73–75).

It is significant that the bible of the lazy lawyer (and judge), California Jurisprudence, has kind words to say about arbitration generally. In 5 Cal. Jur. (2) p. 77, we find this comment: "There are many reasons why arbitration is preferable to the ordinary course of judicial proceedings. It tends to conserve business relations, provides greater opportunity for beneficial results to all parties, is a more flexible procedure, and avoids unwelcome publicity. On the other hand, a suit often causes ill will and a discontinuance of future trading, is more of a gamble and usually allows recovery only to one party, is governed by more rigid rules of procedure, and naturally attracts undesirable publicity. One of the most important advantages of arbitration is that usually the determination is made by specialists in the trade while those who make decisions in court do not always have such expert knowledge." Since that last sentence may be considered a libelous reflection upon the infallibility of judges, I should not have included it, except of course that I interpret it to have reference to juries only. Those who have participated in jury trials recall that if upon *voir dire* examination a prospective juror is found to have any knowledge whatsoever upon the general subject involved in the lawsuit, he is preemptorily challenged and excused. In fact, if his I.Q. is over 100, he is immediately suspect. In arbitration, conversely, any knowledge of the field of controversy is considered a distinct asset to the arbitrator. Most businessmen prefer to have their problems determined by an arbitrator who does not require tedious briefing in the fundamentals, terminology, practices and customs of their particular business. Therein lies one of the major time-saving elements.

We cannot blind ourselves, however, to one inherent danger in that pre-existing knowledge of the businessman arbitrator. Along with

his store of data regarding the nature of the business, there is always a serious possibility that he may also have acquired beliefs concerning the general reputation, truthfulness, financial responsibility, or relationships of one or more of the parties. While Rule 18, Commercial Arbitration Rules of the American Arbitration Association calls for the disclosure by the arbitrator of "any circumstances likely to create a presumption of bias," it takes remarkable insight to recognize a prejudicial state of mind. Our courts provide the procedure by which a biased judge may be disqualified. In arbitration, the parties having selected the arbitrator, are apparently satisfied with his impartiality; but in a situation in which the arbitrator is chosen for them, there is no technique for removing the biased arbitrator, except through court action. And as has often been said, if the parties are to go to court eventually, then there are no advantages to arbitration.

When the first arbitration legislation was passed there was widespread suspicion among lawyers that here was a major threat to their indispensability. Many businessmen looked at the legal profession as parasitic, particularly so long as they could refer their problems to an arbitrator without benefit of counsel. This unrealistic approach reckoned without creeping legalism, however. Since most contracts calling for arbitration were prepared by lawyers, they had a continuing interest in any dispute arising under the agreements. Thus their participation in arbitral matters became more common. For the year ending December 31, 1926, the American Arbitration Association reported only 36% of the parties to commercial arbitration at the hearing stage were represented by counsel. Twelve years later that figure rose to 70%. By 1946, it was 82%. In labor arbitration, lawyer participation is over 91%.

Actually the organized bar never was formally opposed to arbitration. One of the bar's constructive critics, Prof. Willard Hurst of the University of Wisconsin Law School wrote in his *Growth of American Law*, p. 325, that the most "notable exception to the bar's general unconcern toward the costs of legal service was the support which the American Bar Association gave to legislation effectively implementing commercial arbitration." The lawyer who has given arbitration a fair opportunity finds no menace to his professional security. On the contrary, he may experience in organized tribunals, standard rules of procedure, favorable arbitration laws, available qualified arbitrators and comfortable hearing-rooms, opportunity for the practice of arbitration which ultimately may have as large a role in his total program as have court trials. Many lawyers have experi-

enced not only advantage to their clients in commercial arbitration because of its dispatch, but utility to themselves. This is found not only in the speed with which arbitration is handled and determined, but the convenience in setting hearings when and where he wants them (subject, of course, to the equal convenience of his adversary). Lawyers who have had prior misgivings over fees in arbitration matters for the most part have been disabused of those fears. While on a strictly hourly billing, court trials will produce more revenue for the law office, as a practical matter most lawyers charge clients on a basis of hours plus results achieved. A client who has been saved both the inconvenience of a long delay before trial, and a tiresome trial itself, and who has experienced a less protracted and expedient arbitration proceeding, may well consider the results achieved sufficient to justify a thoroughly adequate counsel fee.

The congestion of our modern courts has been a major contributing factor to the increased use by businessmen of arbitration, and probably also to the gradual acceptance by lawyers and judges of this departure from the traditional courtroom proceeding. In many metropolitan cities, litigants must wait as long as three years before a case, once all the pleadings are completed, comes to trial. On October 23, 1952, Chicago newspapers reported the bar association there gravely concerned over a backlog of 52,000 cases in the county circuit and superior courts. Certainly a three-year lapse before a claimant may be heard is a demonstrable example of justice delayed being justice denied. Prof. Hurst correlated this court congestion with increased use of arbitration, finding "that courts disposed of steadily, even vastly increasing, volumes of civil litigation through 1900. Thereafter the competition of administrative decision and commercial arbitration began to cut the proportion of dispute business that went to court."

In California, we have a unique problem of judicial administration. Our unparalleled population growth has brought an inevitable increase in case filings, while economy-minded legislators have failed to provide a corresponding increase in quantity of judges. However, I am pleased to report that the judiciary here in Los Angeles County has what we believe to be the finest record of disposition of work of any metropolitan area in the United States. Although 85,475 cases were filed in the Los Angeles County Superior Court in 1951, an increase of 3,000 over the previous year, at the end of the year there was a backlog of only 6,268 contests awaiting trial. As of the first

of this past year, jury trials were being set for nine months after requests were made, and non-jury cases in six months.

If I may, at this point, I should like to offer one word of caution to prospective arbitrators. The extension of their jurisdiction in a particular arbitration and the form of their award are matters of considerable importance, if their conclusions are to be sustained by a reviewing tribunal. For it is now well settled that ultimately the question of the construction of a contract, to determine what queries the parties agreed to submit to arbitration, is one for the court to decide and not for the arbitrators themselves. To allow the arbitrators conclusively to decide what questions were submitted to arbitration, is to allow them finally to determine the extension of their own jurisdiction. There are many cases so holding (see 136 A.L.R. 364). To avoid this danger of having the reviewing court find an award to be in excess of jurisdiction, the arbitrators should be particularly wary of their written opinion. Although technical precision is not required in an award of arbitrators (*Dugan v. Phillips* (1926) 77 Cal. App. 268), I would urgently suggest that arbitrators follow the form of award provided by the American Arbitration Association. In the event they feel impelled by some uncontrollable urge, literary fluency, good conscience, or mere garrulousness to express themselves about the case they have tried, the opinion should be a separate document and not part of the award itself. Thus it would be comparable to a trial court's opinions, which appellate courts have consistently held are not controlling in the event they are in conflict in any respect with Findings of Fact and Conclusions of Law.

The inevitable conflict is between those who contend for the application of certainty in determination of disputes versus those who want fluidity. These views are best expressed by Roscoe Pound and Jerome Frank. Dean Pound, whom we are honored to have at the University of California, Los Angeles, has spoken for rigidity in interpreting commercial transactions. In his *Interpretations of Legal History*, page 154, he wrote: "In matters of property and commercial law, where the economic forms of the social interest in the general security—security of acquisitions and security of transactions—are controlling, mechanical application of fixed, detailed rules or of rigid deductions from fixed conceptions is a wise social engineering. Our economically organized society postulates certainty and predictability as to the incidents and consequences of industrial undertakings and commercial transactions extending over long periods. Individualization of application and standards that regard the individual circum-

stances of each case are out of place here. . . . The circumstances of the particular case cannot be suffered to determine the quality of estates in land nor the negotiability of promissory notes. One fee simple is like another. Every promissory note is like every other. Mechanical application of rules as a mere repetition precludes the tendency to individualization which would threaten the security of acquisitions and the security of transactions." In justice to the learned Dean, however, I should point out that he suggests a different standard for cases raising problems of "human conduct," or involving the conduct of enterprise, fraud, good faith, negligence, or fiduciary duties.

Justice Frank, in his *Law and the Modern Mind,* argues in essence for individualization. He maintains that: "In respect to the law: If we relinquish the assumption that law can be made mathematically certain, if we honestly recognize the judicial process as involving unceasing adjustment and individualization, we may be able to reduce the uncertainty which characterizes much of our present judicial output to the extent that such uncertainty is undesirable. By abandoning an infantile hope of absolute legal certainty we may augment markedly the amount of actual legal certainty. . . . It is about time to abandon judicial somnambulism."

In conclusion, let me say I cannot go along with either the most enthusiastic advocates of arbitration that it is a nostrum for all judicial ills, nor with the staunchest defenders of the legal *status quo* who find no advance possible for our present courtroom adversary practice. As Philip G. Phillips wrote in 48 Harvard Law Review 141, "to assume that the very defects of our court proceedings would not be transferred to a wholesale system of arbitration, to assume that clients as well as attorneys would act on a different moral level, shows a naive love of human nature, or of the arbitral process. Contentious, low-moralled or profit-seeking parties can turn any type of dispute-resolving process into a mockery of justice, except under the strictest, wisest, most honestly administered system of public tribunals." It seems certain that either method of resolution of controversy depends upon the good faith of the contestants and the wisdom of the arbitrator or judge. There is no system yet devised that can eliminate the human equation.

But in the final analysis, there need be no conflict between arbitration and the lawyers on one hand, or arbitration and the judiciary on the other. It is likely that neither field is a panacea for all the ills of commercial conflict. Both may well exist, with each exuding its

value to the body politic and economic if we bear in mind the thoughtful words of Justice Cardozo, in his *Nature of the Judicial Process:* ". . . our survey of judicial methods teaches us, I think, that the whole subject-matter of jurisprudence is more plastic, more malleable, the moulds less definitely cast, the bounds of right and wrong less preordained and constant, than most of us, without the aid of some such analysis, have been accustomed to believe. We like to picture to ourselves the field of law as accurately mapped and plotted. We draw our little lines, and they are hardly down before we blur them. As in time and space, so here. Divisions are working hypotheses, adopted for convenience. We are tending more and more toward an appreciation of the truth that, after all, there are few rules; there are chiefly standards and degrees. . . ."

Symposium on Commercial Arbitration

Commercial Arbitration is the subject of an excellent Symposium which appeared in the summer and fall issues of *Law and Contemporary Problems,* Duke University.* The problems which the various contributions to the Symposium attempt to explore, are most interestingly set forth by the Editor, Professor Robert Kramer, in a foreword which, for its searching treatment of actual arbitration questions, is herewith reprinted.

"During the past decades commercial arbitration has firmly established itself in this country and abroad, both in common and civil law jurisdictions, as a method for handling and settling certain types of disputes, many of which might otherwise have been tried in the regular courts. The courts, themselves, at times reluctantly and only after considerable statutory prodding, have finally, to a large extent, recognized the general validity of the arbitration process, and now lend their aid to the enforcement of the contract clauses and procedures of arbitration. Having acquired statutory, judicial and commercial sanction, arbitration today faces new and difficult problems. For example, how useful might arbitration be in areas of commercial law other than those of private contracts between individuals? Might it reduce the often appalling expenses, complexities, and delays in patent infringement proceedings? Would it offer a fresh and helpful approach to the thus far largely unsolved problems of enforcing and policing the many antitrust decrees which in effect are regulations of various aspects of the far-flung operations of a national industry, such as the distribution of moving pictures? What about introducing arbitration into contracts between the government and its suppliers? What are the legal and policy objections which have thus far prevented its use in such contracts, even in periods when the government, as in World War II, is the largest single purchaser, directly or indi-

* Part I, Summer, 1952: Arbitration under Government Contracts: Robert Braucher; Arbitration As an Aid in the Enforcement of the Antitrust Laws: James V. Hayes; Self-Government in the Securities Business: Howard C. Westwood and Edward C. Howard: The Administration of the U. S. Arbitration Act: Wesley A. Sturges; On the Enforcement Abroad of American Arbitration Awards: Martin Domke; The Conflict of Laws in Commercial Arbitration: David S. Stern.
Part II, Fall, 1952: Theory of the Arbitration Process: Kenneth S. Carlston; Practical Problems Confronting the Practicing Lawyer: Lionel S. Popkin; English Arbitration Practice: G. Ellenbogen; Arbitration Procedure Compared with Court Litigation in Patent Controversies: John F. Robb; The Significance of Arbitration—A Preliminary Inquiry: Soia Mentschikoff.

rectly, of the products of our economy? Is the "Disputes" article and procedure of the standard government contract as satisfactory as modern arbitration?

Other problems arise from the increasingly nationwide and worldwide use of arbitration in commercial agreements. To what extent will or must American state courts recognize and enforce either arbitration agreements or awards (including judgments thereon) which have been made or are to be carried out beyond the jurisdiction of these courts? What are the requirements, if any, of due process and full faith and credit here? What happens when the award is made or is to be executed in a foreign country? How will the courts of that country treat American arbitration clauses and awards and what recognition will American courts give foreign clauses and awards? What has happened to arbitration in Great Britain, which, at least at one time, was generally believed to lead the world in the development of systems of commercial arbitration?

How adequate are the arbitration statutes in force today in this country? In particular, is the Federal Act, virtually unchanged since its adoption many years ago, still satisfactory, or does it need amendment, judicial or legislative, to broaden its scope and coverage beyond those transactions involving maritime matters and commerce and to clarify its relation to modern collective bargaining agreements?

What about the actual drafting of arbitration clauses for contracts? How satisfactory are the various standard forms now so widely used?

Finally, granting the merits of arbitration, two fundamental questions continually arise. First, how determine when to use arbitration, and when to use other methods, judicial or administrative, for the settlement of future or present disagreements? Are there any criteria that are helpful in making this decision? Second, to what extent does arbitration represent but one phase or step in a potentially much more significant tool for our modern economy—namely, the regulation and policing of an industry or social group, not directly by the state through an administrative agency with manifold rules and regulations, but instead by the industry or group itself, organized and functioning with the approval and under the general supervision of the state? The experience of the SEC with over-the-counter trading of securities, described in one article in this symposium, is an excellent example of this. Arbitration has been called a system of self-government. Might it not be utilized by the state, with proper safeguards, to obviate through proper self-policing by the group itself the need, in certain cases, for state regulations and controls?"

Arbitration in the Field of Insurance

Howard L. DeMott

Member of the New York Bar

While arbitration today is used extensively in the settlement of disputes in various industrial and commercial transactions between private individuals and business concerns its use in the field of insurance has been somewhat limited. A beginning was made in New York in the 1930's to encourage the arbitration of insurance claims by George S. Van Schaick, former Superintendent of Insurance who had been an enthusiastic supporter of arbitration in this field.[1] Shortly before his retiring in 1935 as Superintendent of Insurance Mr. Van Schaick had sent letters to all insurance companies doing business in New York State requesting their cooperation. Replies were received from 142 companies; of these 113 were in favor of arbitration; only 14 were opposed and 15 were non-committal. Of the 81 fire company replies, 73 were favorable; while 27 of the 36 casualty companies had endorsed the proposal. 13 of the 25 life companies were in favor of arbitration. Thus it would appear that if a majority of the insurance companies at that time were in favor of arbitration, a greater use should be made of arbitration in this field today. To arrive at some explanation of the problem, it is necessary to examine what has been done in the settlement of disputes by arbitration in the various branches of insurance.

Probably fewer disputes arise in the life insurance branch than in any other branch of insurance. In the life insurance branch the disputes which do arise usually involve cases where the insured was

[1] This effort was promoted under a special committee of lawyers of the American Arbitration Association headed by Kenneth Spence, then Chairman of the Executive Committee of the Bar Association of the City of New York, which secured the cooperation of the Superintendent of Insurance, the President Justice of the Municipal Court and a substantial group of members of the New York Bar who volunteered to serve as arbitrators. See *Symposium on Arbitration in Insurance*, in The Arbitration Journal vol. 1, p. 24–57 (1937). A record of the participation of the Superintendent of Insurance will be found in Arbitration and Claim Procedure by Louis H. Pink, former Superintendent of Insurance of the State of New York (address delivered at the 27th Annual Convention of the International Claim Association, September 14–16, 1936).

guilty of fraud or misrepresentation at the time he applied for the policy. Usually arbitration would not be adaptable to fraud cases but can best be applied when there arises a legitimate dispute as to fact between the parties. However, situations may arise in this branch where it would be beneficial to both the policyholder or beneficiary and the company to settle the matter by the use of arbitration. While the use of arbitration may be desirable in the life insurance branch its need at this time is not urgent.

Generally speaking, there is very little opportunity for the use of arbitration in the fire insurance branch. This is largely due to the fact that the standard form of fire insurance policy already provides for an appraisal of the loss much in the same way for all practical purposes as an arbitration proceeding would provide. Traditionally, in most jurisdictions in the United States and in some foreign jurisdictions the rule has been that arbitration clauses in policies will not be upheld where they operate to oust the courts of jurisdiction. A distinction is made, however, between an agreement to arbitrate the liability of the insurer and an agreement for an appraisal of the loss. In the latter instance, the liability of the insurer already has been conceded and the arbitration is only for the purpose of determining the amount of the loss. These so-called arbitration clauses wherein each party has agreed to submit the question of the amount of loss to an arbitrator selected by the parties usually have been held valid as the courts were not thereby ousted of jurisdiction. The typical provision inserted today in fire insurance policies is that which provides that in case of a dispute arising as to the amount of the loss, the matter shall be settled by arbitration and that no action may be brought upon the policy until an award has first been made fixing the amount of the loss. Thus arbitration and an award fixing the amount of the loss is made a condition precedent to any right of action at law or in equity for the recovery of any claim on the policy.[2] This provision has been enforced in most jurisdictions with the exception of Nebraska where the courts have taken the contrary view i.e. that the effect of this provision is to oust the courts of jurisdiction.[3] In Massachusetts, New York and in most other States the standard form of fire policy contains this provision. In practice what appears to be an arbitration clause in the policy is in fact nothing more than an appraisal clause for it is the amount of the loss rather than the liability of the insurer

[2] *Hamilton v. Liverpool & Globe Ins. Co.*, 136, U.S. 242; *Hamilton v. Home Ins. Co.*, 137 U.S. 370; *Silver v. Western Assurance Co.*, 164 N.Y. 381.

[3] *German-American Ins. Co. v. Atherton*, 25 Nebr. 505, 41 N.W., 406; *Home Fire Insur. Co. v. Bean*, 42 Nebr. 537, 60 N.W. 907.

which must be referred to arbitration. However, in defense of the appraisal clause it may be mentioned that this clause fulfills the need of arbitration in the vast majority of disputed fire loss claims since the company has already conceded liability for the loss and it is only the amount of the loss in these cases which is ever in dispute. But in those cases which frequently do arise where the company has denied liability altogether this clause is of little benefit to the party seeking an arbitration of the claim. This appears to be the rule in New York where the New York Courts have held that an arbitration clause in the form as above stated in the standard fire insurance policy has no application where the company has denied liability but is only applicable to those cases where there is a disagreement as to the amount of loss or damage.[4]

In the marine insurance branch the standard form of marine policy usually does not contain an arbitration clause providing for the settlement of disputes by arbitration. The absence of such a provision is due mainly to two reasons. First, a marine policy basically is an agreed value policy and not a policy of indemnity as in the case of fire insurance. The assured may insure at any value which may be agreed upon with the insurer. Thus it is unlikely that a dispute will arise as to the amount of the loss as in the case of fire insurance. Probably a more important reason is that traditionally a marine insurance policy is an ancient document and as such its terms are well understood by the force of ancient customs and usages which have grown up through the years and which have become a part of the law merchant. The latter mainly accounts for the fact as to why arbitration is not used extensively in this branch of insurance today.

While the use of arbitration is desirable in all branches of insurance the branch in which arbitration is most critically needed today is in the casualty branch, or more specifically, third party liability insurance. The tremendous number of accident cases brought in the courts in the City of New York within the past few years has been staggering. In the majority of these cases an insurance company has been involved. In an address delivered recently by Presiding Justice Peck of the Supreme Court, First Department in New York City, before a meeting of the members of the bar and insurance company executives invited to hear the courts' recommendations for the handling of personal injury actions,[5] Justice Peck remarked that the justices were profoundly disturbed by the continuing inability of the courts to cope

[4] *Maimes v. Auto Ins. Co.*, 112 Misc. 656, 183 N.Y.S. 690, aff'd 196 App. Div. 921.

[5] N.Y. Law Journal, Vol. 127, No. 10, January 15, 1952.

with the volume of accident litigation and the consequent mounting delay in reaching cases for trial. The line up of negligence cases awaiting trial in the Supreme Court is already close to four years behind. The impact of the following excerpts from Justice Peck's address should not be overlooked:

> "Thus we must acknowledge that for all efforts to date we have not found the way of handling the influx of accident cases and must recognize that present practices and procedures are insufficient. If we fail to take further measures and find the means of dispensing timely justice in these cases as a court service then we face the inevitable day when a public sufficiently aroused and exasperated will take these cases, automobile accidents at least, bodily out of the court and place them with an administrative agency like a compensation board."

In another paragraph from the same address the following statement appears:

> "Have we not from our own precincts witnessed the flight in large measure of commercial litigation to arbitration? Negligence claims to compensation is only the next step unless their handling by us is vastly improved."

While Justice Peck recognizes the strong social argument in favor of a compensation system for the handling of accident cases he does not believe that such a system would be advisable if it is possible to deal with accident cases in the courts without undue delay. Although reference is made by Justice Peck to the possible alternative that a sufficiently aroused public may demand that these cases be handled by a compensation board yet it would seem that this would be the greatest challenge for the use of arbitration today. In this field a real opportunity now exists for the elimination of the protracted delay of court trials and the unnecessary expense involved by promoting a prompt settlement of all accident claims by the use of arbitration. As often happens after a case has been brought on for trial and there has been a delay of two, three or more years depending upon the condition of the court calendar, the case is settled on the eve of trial because much of the evidence upon which the plaintiff has relied in order to prove his case has vanished by the mere running of time. Material witnesses may no longer be available or have since died. In these circumstances the plaintiff will usually try to settle his claim with the insurance company usually at a figure which in many instances does not adequately compensate him for the delay.

While the use of arbitration in this field admittedly would be of advantage to the insured or to a third party claimant, the settlement of claims by arbitration would also be of benefit to the insurance companies. The elimination of the costly delays incident to litigation would make for public good will which would react most favorably to the entire insurance industry. There would be a better feeling between the parties and the absence of bitterness which often accompanies long drawn out court battles. The main difficulty today seems to be to get the insurance companies to agree to settle all claims in this field by arbitration by inserting appropriate arbitration clauses in their policies. Insurance companies generally have been conservative in their practices over the years and arbitration is, relatively speaking, a new technique. An attempt was made in this direction in 1928 by the Metropolitan Casualty Company in New York in an effort to popularize the arbitration of all disputed meritorious claims. As an experiment the company had attached endorsements or riders to its policies under which it was agreed with the assured to arbitrate all bodily injury and property damage claims where the amount did not exceed $5,000 for any one person or where the aggregate of the claims arising under the policy from the same accident did not exceed $10,000. The experiment failed largely due to the fact that only one company had adopted the plan and there was a general reluctance on the part of the other companies to follow suit.[6]

While today it would seem that the solution might be to require all casualty companies to adopt arbitration riders to their policies similar to the rider adopted by the Metropolitan Casualty Company, such a plan for compulsory arbitration would require a legislative enactment to the present insurance laws of the several states. It is doubtful whether such attempts to amend the state insurance laws would be successful for political reasons. The only practical solution would be to educate a few of the larger casualty companies to adopt an arbitration endorsement to their policies for an experimental period. The length of the trial period may be limited to any reasonable length of time mutually agreeable to the companies. While a similar attempt was made by Mr. Van Schaick almost twenty years ago which failed to achieve the desired results, nevertheless it is believed that sufficient time has elapsed whereby it would be feasible to try the experiment again. With the present day mounting congestion of accident cases awaiting trial in the courts it is believed that such a plan if properly organized would stand a better chance of suc-

[6] See address by Louis H. Pink, *supra*, note 1.

cess today. During this trial period the companies would do well to advertise to the general public that all disputed claims arising under their policies with the assureds are to be settled by arbitration without the necessity of court action. If at the end of the period the plan proves to be a success, other companies will automatically follow suit without the necessity of first selling the plan to them. If on the other hand the plan should fail to produce the desired results then something else is needed other than arbitration. Quoting Justice Peck, perhaps a compensation plan would be the solution. Since the disadvantages of such a plan are apparent it should not be resorted to except as a last resort and then only after it has been conclusively established that all efforts to bring about the use of arbitration in this field have failed of adoption. Meanwhile, it is imperative that steps be taken reasonably soon to effect a prompt settlement of all disputed accident claims or the day will come when much of the good will which the insurance companies now enjoy will be lost. The general public who are the potential policyholders will not be eager to become such if they should find by experience that it is impossible to settle a disputed claim on their policies without incurring the costly delays of litigation.

LABOR DISPUTE–SETTLEMENT IN CANADA

The Collective Agreement Act, Quebec, provides that where a collective agreement has been entered into by an organization of employees or one or more employers or associations of employers, either side may apply to the Provincial Minister of Labour to have the terms of the agreement made binding throughout the province on all employers and employees in the trade or industry covered by the agreement. Each agreement is administered by a joint committee of the parties. A note in Labour Gazette vol. 52 (1952), p. 1479, deals with recent proceedings under this Act, including its extension to new agreements in the ladies' handbag manufacturing industry and amendments of agreements for retail stores and the watch repair industry. . . . A previous issue of the same periodical reported on p. 935 about an addition to the City Act in Saskatchewan whereby a city council may agree to refer to a board of arbitration a dispute concerning certain conditions of work of the employees. The council may also agree that the decision of the board will be binding on the city.

Japan-American Commercial Arbitration Agreement

The Japan-American Trade Arbitration Agreement,[1] concluded on September 16, 1952, between the Japan Commercial Arbitration Association and the American Arbitration Association, was celebrated both in Tokyo[2] and New York[3] by Japan and U. S. Government officials and leading business representatives of both countries. Among the Japanese addresses those by Hon. Ryutaro Takahashi, Minister of International Trade and Industry, and Dr. Kotaro Tanaka, Chief Justice of the Supreme Court of Japan, given in Tokyo on October 10, 1952, and of Hon. Ryuji Takeuchi, Minister Plenipotentiary of Japan, in New York on November 6, 1952, are reprinted here in the belief that the thoughts expressed have a bearing, beyond the actual occasion, on the further development of international commercial arbitration and of agreements between arbitration organizations of various countries.

Hon. Ryutaro Takahashi

Minister of International Trade and Industry

The Trade Arbitration Agreement between Japan and the United States has just been signed today. It is my great pleasure to say a few words of congratulation on this commemorative occasion.

I do not believe that it is necessary to explain the important meaning of the Agreement here. However, we must realize that this Agreement has advanced one more step towards maintaining friendly commercial relations between two countries and that the United States is the first country that has signed the agreement with us, thus leading the rest of the world. Being a chairman of the Japanese Arbitration Committee at the time of its organization, I cannot help feeling deep emotion for kind advice and help the American Arbitration Association has extended to us in the past.

[1] For the text see this *Journal* 1952, p. 151.

[2] See *Monthly Report of Japan Commercial Arbitration Association* No. 10, October 1952, for the speeches by Mr. Aiichiro Fujiyama, Chairman of the Japan Commercial Arbitration Association, and by Mr. Arthur K. Watson, Vice President of IBM World Trade Corporation, who represented AAA at the delivery ceremony in Tokyo.

[3] A full report of the N. Y. dinner meeting at the Union Club appeared in *The Arbitration News*, AAA, No. 8, November 1952. At the meeting, which was presided over by Morris S. Rosenthal, Chairman of the International Business Relations Council, Arthur C. Croft, AAA President, accepted the signed copy of the Agreement brought from Japan by Arthur K. Watson. Among the speakers, Hon. Kenneth T. Young, U. S. State Department Director of Northeast Asia Affairs, and Mr. Yeisuke Ono, Director of the Bank of Tokyo, stressed the importance of the Agreement for the development of trade and other economic intercourse between the two countries.

It is a well known fact that a commercial dispute will usually require a long time to settle, or sometimes will develop into an international lawsuit. Even after the dispute is settled by judicial decision, we all know that such a way of settling commercial claims will tend to leave the root of dissatisfaction, which in no way helps to promote friendly commercial relations of countries concerned. With this point in mind, we have been trying to set up an arbitration system in Japan for some time in the past. We would like to express our sincere gratitude and thanks at this occasion to the American Arbitration Association and to those who have contributed their efforts in this direction of beneficial activities that, with their help and assistance, realization of the Japan-American Trade Arbitration Agreement has come into effect. By this agreement, we are to share responsibility of settling international commercial disputes peacefully on the basis of mutual understanding and negotiation.

It is my sincere hope that the Japan Commercial Arbitration Association, as exemplified by the Agreement, will extend further cooperation and strengthen ties with arbitration associations of other countries, thereby promoting the progress of friendly commercial relations among nations of the world.

In closing, I wish that the American Arbitration Association would continue to give their advice and cooperation to our Association which has only been established recently.

Dr. Kotaro Tanaka

Chief Justice of the Supreme Court of Japan

At this happy occasion of celebrating the conclusion of the Agreement between the Japan Commercial Arbitration Association and the American Arbitration Association, I have the privilege of expressing the heartfelt congratulations to both the Associations concerned with this Agreement.

As you know, the inherent value of the institution of commercial arbitration as a quasi-judicial process, aiming at the realization of the harmony between peace and justice in commerce, has been universally recognized and its principles are going to cover other fields of social life such as civil, labor and international disputes, where the peaceful and prompt settlement of controversies is required, furthermore, the application of commercial arbitration is not limited to the national life. Owing to the national character of commerce the necessity of this institution transcends national boundaries and commercial arbitration tends to become global, particularly when confronted with

the fact that the world is relatively shrinking every day and the economic solidarity is more and more intensified. Accordingly, it is quite a natural step that the Agreement was signed on September 16th by the Japan Commercial Arbitration Association and the American Arbitration Association, considering the extremely intimate political, economic and cultural relations between our two countries across the Pacific.

Personally, I have another reason to welcome and congratulate the Agreement. Two years ago, when I had the happy opportunity of visiting the United States as a member of the Supreme Court Mission of Japan, I was warmly received by the leading persons of the American Arbitration Association at Rockefeller Plaza, including International Vice-President Mr. Martin Domke, and passed very profitable time in theoretical talk and observation of the practice of arbitration in the matters of trade and labor. My knowledge was enriched of the noble mission of arbitration to solve the very complicated controversies by more democratic and humane ways than the ordinary judicial process, and fully understood the high national and international esteem of this Association. Consequently, my humble message of congratulations is not only intended for the Japanese friends present here at this ceremony, but for the American friends also, by whose sincere efforts this precious and beneficial fruit has been attained.

The lofty idea of commercial arbitration, I am convinced, is not limited to the narrow scope of trade. I have learned that the aim of arbitration does not exist in simple compromise between conflicting interests but rather in the realization of peace and justice between parties. This aim is nothing else but the aim of the international community, which the whole humanity is striving for.

The network of commercial arbitration, extended beyond frontiers of the state, will finally embrace the two Hemispheres. Its significance is not limited to the material side, but it includes the spiritual side also. The philosophy of arbitration will surely contribute to the advancement of the true internationalism, the universal brotherhood, the essential condition of world peace.

Hon. Ryuji Takeuchi

Minister Plenipotentiary of Japan

On this memorable occasion of celebrating the conclusion of the Agreement between the Japan Commercial Arbitration Association and the American Arbitration Association, it is my great pleasure to say a few words of congratulations.

Centuries have passed since the method of arbitration was invented as a means of solving conflicts, but it still remains one of the greatest products of human wisdom. Only by arbitration can many difficult conflicts and disputes be settled peacefully, fairly and promptly.

In the field of foreign trade especially, the application of arbitration is most valuable because parties of the contracts live far apart in countries with different laws and customs and settlement of disputes between them necessarily is no easy matter. International lawsuits are unsatisfactory as a means of settlement of such disputes not only because of the waste of time and expense they would involve, but also because of the unfriendly feelings they unavoidably leave behind.

For the people of Japan who must depend on foreign trade for existence, the signing and coming into effect of the Trade Arbitration Agreement is a significant step forward. In view of the utmost importance for Japan of trade with the United States, it is gratifying that the first Agreement of this kind has been signed between our two countries.

I am confident that this new agreement will contribute a great deal to maintaining friendly commercial relations between our two countries and I wish to express our sincere thanks for the energetic initiative and untiring efforts of the members of the American Arbitration Association who have been instrumental in bringing about this valuable Agreement.

French Experiences, Legislation and Machinery For Settlement of Labor Disputes

A French Study Group on Settlement of Labor Disputes, under the leadership of an Assistant Justice of the French Court for Administration and Labor Affairs, and consisting of thirteen members of important management and labor organizations as well as French government officials and educators, visited the United States. The Team's visit is part of the Production Assistance Program of the Mutual Security Agency, which seeks to strengthen the economy of Western Europe, and to further good labor relations as the keystone of increased production and thus lay the foundation for a substantial improvement in living standards. Among the organizations participating in the United States was the American Arbitration Association, where arrangements were made for a general discussion of the objectives and functions of American arbitration practice and its role both in commercial and industrial relations. The Team attended hearings and interviewed arbitrators and participated in a panel discussion on emergency disputes. The following brief description of French administration of labor disputes was furnished as a background paper by the U. S. Department of Labor.

"While the French labor movement has a long history, French experience with certain aspects of collective bargaining has been somewhat less extensive than that of the United States. During the war, the numerous basic contracts agreed upon since 1936 remained in force; however, collective bargaining was completely suspended; and wages were fixed by Government decree, both during the war and until the official restoration of collective bargaining under the law of February 11, 1950. Ever since that time periodic political crises resulting from a rapid rise in prices have been solved by the passage of laws setting legal minimum wage rates, or fixing bonuses, or (most recently) providing for an automatic wage escalator. Wages above the minimum have been adjusted, with some lags, to maintain customary differentials. Except for a brief period in 1937–39, there was no legislation providing for Government intervention in labor disputes until February, 1950, when the Collective Bargaining Law was passed. Consequently France has no experienced Government staff of conciliators or a mediation service such as has long existed in the U.S.; however, labor and manpower services, especially labor and

manpower inspectors, have long been active in conciliation activities.

There are a number of trade union federations. The oldest and largest is the Confederation Generale du Travail (CGT), which at present is communist-dominated. The Confederation Francaise des Travailleurs Chretiens (CFTC), a federation of Christian trade unions formed in 1919, is the second largest of the federations. A large non-communist group, which seceded from the CGT, formed the Force Ouvriere (CGTFO) in early 1948. Since then political strikes have been less serious and less prolonged. The Confederation Generale des Cadres (CGC) is composed of foremen and supervisory employees.

In France there is a clear cut distinction between "collective disputes" whose ways of settlement are established by the Collective Bargaining Law of February 11, 1950; and "individual disputes" which may be settled by the "Conseils de Prud'hommes," which are specialized labor courts with a long established tradition; and by Justices of the Peace where no Conseil de Prud'hommes has been established.

The Collective Bargaining Law of February 11, 1950, which is the basic legislation on industrial relations now in force, defines the scope of collective bargaining agreements and prescribes the procedures to be used in their negotiation. It established a Superior Commission on Collective Agreements (Commission Superieure des Conventions Collectives), composed of representatives of Government, management, labor and the public, under the chairmanship of the Minister of Labor and Social Security, to advise on the sufficiency of agreements negotiated and on their application, extension and withdrawal.

National or industry-wide agreements must be negotiated if requested by a "representative"[1] association of either employers or unions, or by the Minister of Labor. Such agreements must cover a wide range of prescribed subjects, including among others, procedures for handling grievances, conciliation, shop steward selections and contract revision.

Under certain circumstances the Minister of Labor may extend national agreements to cover all workers and employers in an entire industry or occupation. Regional or local agreements may increase but not lessen benefits accorded by a master national agreement.

[1] A union is considered "representative" if it has as its members at least 10 percent of the workers in the industry *and* 25 percent of those in the occupation covered; or if it has 35 percent of those in the occupation covered. Other criteria include the organization's total paid dues, "independence," "experience and seniority" and "patriotic attitude" during the occupation.

There is provision also for "accords" at local and regional levels, which are not full-fledged agreements as defined by the law. "Accords" usually deal with wages and frequently supplement national agreements. General minimum wages are still fixed by the Government in consultation with the Superior Commission.

Conciliation procedures for the settlement of disputes must be included in all national contracts and may be invoked by either party, or by the Minister of Labor or the Prefect of the Department[2] in which the dispute occurs. If for any reason a collective labor dispute has not followed procedures provided by an agreement, it must be submitted to the appropriate national, regional or Departmental conciliation commission. These bodies are composed of an equal number of representatives of employers, workers and the public. There is now one national conciliation commission; 13 regional commissions; and 51 "departmental sections," for metropolitan France, of which 4 are for Overseas Departments.

The law recommends but does not require that collective agreements provide arbitration procedures for issues which cannot be resolved by conciliation. If there is no such provision, the parties may submit an unsettled dispute to an arbitrator chosen by agreement between them. An arbitrator may rule only on questions certified to him as unresolved by the conciliation procedure. His decision is legally binding, but may be appealed by either party to the Superior Court of Arbitration established by the Act. If the Court annuls the decision of the arbitrator, the parties must select another arbitrator. If the decision of the second arbitrator is appealed and annulled by the Court, the Court itself renders a final judgment.

At the plant level, grievances of individual workers or groups of workers concerning application or interpretation of agreements go initially to the shop stewards for negotiation with the employer. Shop stewards, elected from nominations from the "most representative" unions are required by law in plants employing 10 or more workers.

Works Councils (Comites d'Entreprise) which are somewhat similar to our Joint Labor-Management Committees, are required by law in all firms employing 50 or more workers. It is their responsibility to consider disputes concerning welfare activities, working conditions, improvement of productivity, and prices of the company's product or general company policy affecting labor.

If plants do not have either Works Councils or shop stewards (delegues du personnel) or if these are unable to effect a settlement,

[2] A French administrative district, similar to our counties. There are 90 Departments at the present time.

disputes concerning terms of employment may be taken to the local Conseil de Prud'hommes. These specialized "labor courts" of which there are now 218, have existed in French cities and towns over a long period of time. They are composed of an equal number of elected representatives of employers and employees. Their function is to settle disputes arising between an employer and an individual employee as a consequence of the labor contract. Their primary task is conciliation. They hand down a decision only if they are unable to bring about agreement between the parties.

Decisions can be appealed to the regular district courts ("tribunals civils") and reversal of a decision can be asked from the "Cour de Cassation" which is the highest civil court in France."

LABOR ARBITRATION IN PERIODICALS

"Legal and Economic Significance of Labor Arbitration Awards" by Walter E. Boles, Jr., in the Southwestern Law Journal, vol. 5 (1952), p. 393, contains a well-documented survey of problems related to the enforcement of awards both under statutes and at common law, and the function of awards as precedents. . . . "Compulsory Arbitration—A Solution for Industrial Decay," by William H. Stanford, Jr., in University of Pittsburgh Law Review, vol. 13 (1952), p. 462, contains in not less than 241 notes extensive references to the issues considered in the article which deals with the important topic of compulsory arbitration, not only from the legal point of view but also in its political, social and economic aspects. . . . "The Enforceability of an Arbitrator's Award of a Penalty", a note in Columbia L. R., vol. 52 (1952), p. 943, discusses the decision in *Matter of Publishers' Association of New York City,* 280 App. Div. 500, which was digested in this Journal, 1952, p. 179. . . . "Significant Developments in Labor Law During the Last Half-Century", by Russell A. Smith, in Michigan L. R., vol. 50 (1952), p. 1265, considers arbitration under the viewpoint of "Maturation of Collective Bargaining". . . . "Doff the Black Robes!" by Isadore Katz and David Jaffe, in Labor Law Journal, vol. 3 (1952), p. 743, deals with the function of the National Labor Relations Board as an administrative agency which has an obligation to cast all possible light on the broad field that Congress has entrusted to its care.

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under the main headings of: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

A construction agreement which made no reference to arbitration, embodied by reference the General Conditions of the basic contract which also did not include a reference to arbitration but in turn referred to the General Conditions of the American Institute of Architects which provide for arbitration (see Standard Form of Arbitration Procedure, A.I.A., Document No. 305, Second Edition, 1949). Whether a binding provision for arbitration was thus made by the parties constitutes a triable issue. Said the court: "The General Conditions, which seem to bear the initials of one of the respondents, make no reference whatever to arbitration to embrace by reference the General Conditions of the American Institute of Architects. Respondents claim that at the time of the contract they know nothing of the General Conditions, did not see them, and that there was no reference made, by conversation or otherwise, to the subject of arbitration. Petitioner urges the claim is sham. The initialing of the General Conditions, the claimed background of the respondents and the contention of the architect that the subject of arbitration was discussed tend to support the claim of pretense. However, the issue is tendered and must be tried." *Glaser v. Nash,* N.Y.L.J., October 31, 1952, p. 1021, Aurelio, J.

Retention of a contract (with an arbitration clause) by the buyer who did not sign it, does not constitute a binding agreement to arbitrate when the contract expressly provides that "this instrument shall become a contract when signed by the buyer and accepted in writing by seller at its home office." The contract further provided that "buyer shall nevertheless be bound when either delivery dates, shipping instructions or instructions to bill and hold as to all or any part of the goods have been given to seller by buyer or by any party designated by him." The court held that the giving of dates was not to create a contract but "to obligate the buyer only and not the seller. Such a unilateral provision may not be given effect since a contract in which only one party is bound is not a contract at all." The court distinguished *Matter of Bellmore Dress Co., Inc.,* N.Y.L.J., May 15, 1952, p. 1953, which involved a provision that the order "shall become a *contract* when buyer or his agent has accepted delivery of the whole or any part of the goods." *H. M. Kolbe Co., Inc. v. Ben-Art Frocks, Inc.,* N.Y.L.J., October 10, 1952, p. 775, McNally, J.

"The provision in the broker's sales notes that they would be superseded by seller's own contract did not permit the seller to hold the buyer to whatever

terms it might choose to insert in a later document forwarded by it. The mere retention of the so-called 'contracts' by the petitioner did not constitute contractual asent on the part of the latter (*Matter of Albrecht Chem. Co.*, 298 N.Y. 437, 440). This is particularly true as to the arbitration clause, for it is to be found on the *reverse* side of each of respondent's 'contracts' and there is nothing on their face calling attention to the reverse side nor is any claim made that the clause was called to petitioner's attention in any other manner (see *Matter of Philip Export Co.*, 275 App. Div. 102, 105). What is more, the so-called 'contracts' do not have the appearance of contracts on their face, but resemble invoices. They contain no blanks for the affixation of signatures. One receiving them and not looking at the reverse side would not reasonably regard them as contracts. As it is clear that the parties never entered into a contract for arbitration, this motion is granted to the extent of staying arbitration." *In re Forest Converting Corp'n v. Pepperell Mfg. Co., Inc.*, N.Y.L.J., September 25, 1952, p. 599, McNally, J.

When "the course of conduct of the parties makes it sufficiently clear that the parties contracted on the basis of the sales note, and that conformity of the goods to government specification was a condition of the contract, and not a condition precedent to the existence of the contract, there is no triable issue as to the existence of a contract containing an arbitration clause." An order denying a motion to stay arbitration (see *Arb. J.* 1952, p. 169) was unanimously affirmed. *Crown Coat Front Co., Inc. v. Hir-Tex Corp.*, 280 App. Div. 885.

A sales agreement containing an arbitration clause terminated when a new contract to pay $10,000 by means of the two notes sued on was made. In reversing the court held that "there was no basis to stay the action on said notes for the purpose of complying with an arbitration clause that no longer was in existence. The sales agreement was terminated and the arbitration agreement fell with it." *Regal International, Ltd. v. Sopic Corp'n*, N.Y.L.J., November 26, 1952, p. 1291 (App. Div. First Dept.).

A motion to compel arbitration was granted when "the agreement of June 11, 1952, relied on, attempted to arrange for performance of the original agreement providing for arbitration. Respondent apparently attempted to continue performance of the original agreement in a manner at variance with the June 11, 1952, arrangement which seemingly was at no time satisfied or performed. The original dispute remains unresolved by the agreement of June 11, 1952, or otherwise." *Albert Given Mfg. Co. v. Greenwood Mills, Inc.*, N.Y.L.J., November 25, 1952, p. 1275, Greenberg, J.

A stay order granted in a wage dispute under sec. 3 of the Federal Arbitration Act pending arbitration pursuant to a collective bargaining agreement, is not in the nature of a final judgment but of an interlocutory injunction (*Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 499). Under the well-settled rule in injunction cases such order "may be modified or dissolved in the discretion of the court when conditions have so changed that it is not longer needed or is rendered inequitable. The law in this circuit has been changed since the entry of the stay order in *Amalgamated Assn. v. Pennsylvania Greyhound Lines*, 192 F. 2d 310, when it was made clear that this court had no jurisdiction

to enter the stay order. A change in the law is sufficient justification for a modification of an injunction." (See *Arb. J.* 1952, p. 172.) *Jones v. Mississippi Valley Barge Line,* 21 U. S. Law Week 2161 (D.C. W. Pa., September 29, 1952, Stewart, J.).

Contracts of a wholly-owned government corporation for the purchase of crude rubber to be shipped to the United States from the Netherlands East Indies contained the following arbitration clause: "Failing amicable settlement, all claims, disputes or controversies arising under or in relation to this contract shall be determined by arbitration under the Temporary Procedure for Arbitration between Eastern Shippers, American Dealers, American Consumers, and the Rubber Reserve Company approved by Rubber Reserve Company, September 12, 1941, and such Procedure shall be considered part hereof as if herein set forth in full." A challenge of the arbitration on the grounds that the contracts were for the exclusive benefit of the original parties, and therefore an assignment would not permit proceeding under the arbitration clause, was refuted by the court, which held the duties under the purchase contracts "not so unique or personal as to preclude assignment [which] carried with it the right as an assignee to invoke the arbitration clause," referring to *Lipman v. Haeuser Shellac Co.,* 289 N.Y. 76, *Hosiery Mfrs' Corp. v. Goldston,* 238 N.Y. 22; *In re Lowenthal,* 233 N.Y. 621, and *Bernstein Shipping Company v. Tidewater Commercial Co., Inc.,* 84 F. Supp. 948 (the latter case being digested in *Arb. J.* 1949, p. 304).

A further challenge of arbitration was based on the claim that the parties had intended to limit that procedure to disputes involving quality and to exclude questions pertaining to insurance. Said the court: "However, the arbitration clause prescribing arbitration as the medium for the determination of 'all claims, disputes or controversies arising under or in relation to this contract' is all-inclusive. It commits to arbitration every dispute under the agreement, whatever its nature."

Finally, the question arose as to whether any claim is barred by the statute of limitations and, for this reason, arbitration should be denied. Said the court: "It has been held that in a proceeding to compel arbitration under § 4 of the Federal Arbitration Act only two issues are presented to the Court: (1) The making of the arbitration agreement; and (2) The failure, neglect or refusal to perform the same. (*In re Worcester Silk Mills Corp.,* D.C., 50 F. 2d 966.) The New York Courts in interpreting the substantially similar provision of § 1450 of the Civil Practice Act, which the Federal Act 'closely follows' (*In re Utility Oil Corporation,* D.C., 10 F. Supp. 678, 680), are unanimous in holding that all questions other than the making of the agreement and the refusal to arbitrate are not before the Court on a motion to compel arbitration but must be decided by the arbitrators. (*Matter of Pierce v. Brown Buick Co., Inc.,* 258 App. Div. 679, 17 N.Y.S. 2d 889, affirmed 283 N.Y. 669, 28 N.E. 2d 400; *Matter of Lipman v. Haeuser Shellac Co.,* supra; *Matter of Kahn (National City Bank),* 284 N.Y. 515, 523, 32 N.E. 2d 534; *Matter of Behrens v. Feuerring,* 296 N.Y. 172, 177, 71 N.E. 2d 454.) While there are no precedents based on the defense of the statute of limitations, the cited cases dealing with issues such as fraud, rescission or cancellation of the agreement, the same principle is applicable in the instant case. Though involving questions of law, the issue of whether or not the statute of limitations is a bar to the proceeding is, nevertheless, within the competence of

the arbitrators." *Application of Reconstruction Finance Corp., In re Harrisons & Crosfield, Limited,* 106 F. Supp. 358 (D.C.S.D. New York, Weinfeld, D.J.).

A corporation "is bound by the pre-incorporation agreement (*Morgan v. Bon Bon Co.,* 222 N.Y. 22, at 27; *Jermyn v. Searing,* 225 N.Y. 525, at 538; *In re Super Trading Co.,* 22 F. 2d 480, at 482). The issues proposed are arbitrable (*Martocci v. Martocci,* N.Y.S. 2d 222, aff'd 266 App. Div. 840; *Application of Carl,* 263 App. Div. 887). *Matter of Allied Fruit & Export Co., Inc.* (243 App. Div. 52) must be read in the light of the affirmance in this court of the Special Term in *Martocci v. Martocci* (supra)." *Landersman v. Selig,* N.Y.L.J., November 6, 1952, p. 1072 (App. Div. First Dept.).

Stockholder's claim that an arbitration agreement entered by two corporations is invalid for the reason that it was made without knowledge and consent of the owner of 50 per cent. and 100 per cent. respectively, of the capital stock of the corporations, did not prevail. The court said that the president of the corporations "as such possessed the necessary authority to make the agreement to arbitrate and represent the corporations in the arbitration proceedings (*Twyeffort v. Unexcelled Mfg. Co.,* 263 N.Y. 6; *Aetna Explosives Corp., Inc. v. Bassick,* 176 App. Div. 577, aff'd 220 N.Y. 767)." A motion to stay arbitration was therefore denied. *Weinraub v. Rosenberg,* N.Y.L.J., November 18, 1952, p. 1197, Di Giovanna, J.

A stockholder agreement provided that upon the death of a stockholder, the surviving stockholder should severally purchase the shares and that in the event of any dispute, the price to be based on the book value should be determined by arbitration. A surviving stockholder sought a declaratory judgment to the effect that the term "book value" means the value as shown by the assets and liabilities and excludes good-will if not set forth in the books of the corporation. The court held such judgment unwarranted, referring to *In re Abbott's Will,* 113 N.Y.S. 2d 213 (digested in *Arb. J.,* 1951, p. 251) and "concludes that there is no dispute with respect to jural relationships of the parties and that the plaintiff, in effect, is seeking by this action an advisory opinion for the arbitrators which in no event would be binding upon them. 'Any dispute' with respect to the book value has, by the agreement, been referred to the arbitrators and their determination of the facts and the legal interpretation of that provision is conclusive upon the parties." *Rifkin v. Rifkin,* N.Y.L.J., November 12, 1952, p. 1130, Hart, J.

II. THE ARBITRABLE ISSUE

In a partnership dispute where the agreement provided for arbitration of any and all disputes between the parties, a motion to stay a court action for dissolution of the partnership and to compel arbitration was denied. The court said: "It seems to the court that the provisions of the partnership agreement as to arbitration are not sufficiently broad to prevent the prosecution of an action by one partner to dissolve the partnership, pursuant to section 63 of the Partnership Law. Implicit in a reasonable construction of the arbitration clause is the intention of the parties to arbitrate only such disputes as arise between them in connection with the continuance of the partnership relationship and does not prevent either party from seeking a dissolution in accordance with the Partner-

ship Law (cf. *Matter of Cohen*, 183 Misc. 1034, aff'd 269 App. Div. 663)." *Pike v. Lee*, N.Y.L.J., October 28, 1952, p. 975, Colden, J.

Dissolution of a corporation is not an arbitrable issue under a stockholders' agreement submitting "all claims, demands, disputes, differences, controversies and misunderstandings" to arbitration. Said the court: "However, the agreement does not refer at all to the subject of dissolution and therefore the cross-motion for a stay pending arbitration is denied (*Application of Cohen*, 183 Misc. 1034, aff'd 269 App. Div. 663)." *Matter of Feingersh*, N.Y.L.J. September 22, 1952, p. 557, Stoddart, J.

A claim for specific performance of a contractual obligation to give one party a deed of an undivided one-half interest in real estate is not arbitrable because Section 1448 C.P.A. excludes from arbitration "a claim to an estate in real property." *Rice v. Reilly*, N.Y.L.J., November 20, 1952, p. 1230, Daly, J.

Impossibility of performance of a contract due to regulations of the Office of Price Stabilization, was the issue arising out of a contract for sale of wool by a Rhode Island corporation to a New York partnership, signed in Boston on January 12, 1951. The contract provided for arbitration of "any complaints, differences, controversies or questions which may arise with respect to this contract or the breach thereof." In a proceeding before the District Court, S. D. New York, for an order directing the New York partnership to proceed to arbitration, the question first arose as to the jurisdiction of the Federal Court. The contract providing that the buyer was to issue instructions for shipments from Rhode Island, was considered "one 'evidencing a transaction involving commerce' between the states and consequently within the legislative jurisdiction of the United States." Since there was no dispute as to the validity of the contract at the time of its making, the only question was on the effect of subsequent General Ceiling Price Regulations on the enforceability of the agreement to arbitrate. In referring to *Heyman v. Darwins, Ltd.*, (1942) A.C. 346, where the House of Lords unanimously held that issues of frustration, repudiation and cancellation were properly ones for arbitration under an appropriate clause in a contract valid in its inception, the District Court stated: "The Heyman rule has been followed in this circuit. *In re Pahlberg Petition*, 2 Cir., 131 F. 2d 968. The case of *Matter of Kramer & Uchitelle, Inc.*, 288 N.Y. 467, 43 N.E. 2d 493, 495, 141 A.L.R. 1497, relying upon an English case, *Hirji Mulji v. Cheong Yue S. S. Co.* (1926) A.C. 497, which was explicitly disapproved by the Heyman decision, A.C. 356 at page 401, is distinguishable from the instant one. In the Kramer case, the O.P.A. regulation frustrating performance continued in effect at the time application for the order to compel arbitration under the New York State statute was made. In the instant case, the original regulation had been modified and performance of the purchase and sale provisions made possible under the modified regulation long before application for this order. Again, in the Kramer case, as the New York Court of Appeals observed, 'There is no issue of fact raised by the record.' In the instant case there are disputed issues of fact which might be resolved by arbitration. This disposition is sufficiently broad to indicate that the issue of frustration or impossibility of performance as well as those of repudiation by petitioner, waiver of such repudiation by respondents and

whether petitioner defaulted in failing to specify its arbitrator, are properly subject to an order to compel arbitration under the clause for arbitration in the instant contract." *Petition of Prouvost Lefebvre of Rhode Island, Inc.*, 105 F. Supp. 757 (D.C. S.D. New York, Murphy, D.J.).

"The defense of cancellation or rescission does not preclude arbitration," said the court stating further that "such defense is appropriate for consideration upon the arbitration (*Lipman v. Haeuser Shellac Corp.*, 289 N.Y. 76)." *Adar Co., Inc. v. Lamport Co., Inc.*, N.Y.L.J., October 31, 1952, p. 1022, Rabin, J.

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

An Employers' Association, the Philadelphia Waist and Dress Manufacturers' Association, had entered a collective bargaining agreement providing for the arbitration of all disputes before the Permanent Impartial Chairman, Dr. George W. Taylor, or the Permanent Associate Chairman, William E. Simkin. An employer, who had joined the Association in 1946 and had withdrawn in 1950, contended he was not bound by the collective bargaining agreement, all the more as he had made a separate oral agreement with the union which did not contain arbitration provisions. On his refusal to arbitrate, the Union brought a bill in equity to compel him to proceed to arbitration which the court granted in stating that his contention was "in direct conflict with the language of defendant's application for membership . . . 'thereby also becoming part of the collective agreement now existing between the Joint Board . . . and the Association,' as well as with the Association's By-Law that the applicant 'will comply with the terms and conditions of all agreements with organized labor or others entered into by the Association on behalf of its members.' The acceptance of membership in the Association thus placed defendant in a direct contractual relationship with the Union as to agreements already made by the Association on behalf of its members, as well as those agreements which might be made by it while he remained a member." In rejecting a jury trial and not permitting testimony on the alleged subsequent oral modification or abrogation of a written contract (*Shaffer v. Scharding*, 348 P. 423), the court directed the employer to proceed—within twenty days—to arbitration, pursuant to the collective bargaining agreement, to the extent that the grievances apply to the period of the employer's membership in the Association, and to pay the costs of the court proceedings. *Joint Board of Waist and Dressmakers' Union of Philadelphia v. Rosiusky*, Common Pleas Court, No. 7595, October 31, 1952, Sloane, J.

A member of a union, since he is not a party to the collective bargaining agreement, cannot compel the employer to arbitrate. Said the court: "Under the arbitration terms thereof [of the agreement], only the union has the right to demand arbitration and not any individual members of the union who may have a grievance. To permit individual employees to invoke the arbitration machinery of a collective agreement would disrupt the proper operation of such procedures." The motion was denied without prejudice to a demand for arbitration by the union, which latter had submitted an affidavit to the effect that it has no objection to a determination of petitioner's grievance by arbitration. *In re Sholgen*, N.Y.L.J., September 10, 1952, p. 432, Schwartz, J.

A declaratory judgment was obtained by a union to the effect that a dispute over the re-employment of an employee existed and that a valid arbitration agreement was in force (255 Wis. 613, 39 N.W. 2d 740). Thereafter, the union brought an action in equity for the specific performance of the arbitration clause. The Supreme Court of Wisconsin declared agreements between employers and employees for the arbitration of labor disputes valid but unenforceable in equity without express legislative authorization. The court relied on the Wisconsin arbitration statute of 1931, sec. 298.01, which made commercial arbitration agreements specifically enforceable but expressly excepted agreements between employer and employees, or between employers and associations of employees. (A note on this case by William F. Donovan in 36 Marquette L.R. (1952) 117, refers to the Wisconsin Employment Peace Act of 1939, under which the Wisconsin Employment Relations Board may order the employer to submit to arbitration, when his refusal to arbitrate violates the collective bargaining agreement, as that agency did in *International Association of Machinists v. Wausaw Motor Parts Co.*, No. 1463 Ce-206, Decision No. 1388 (1947).) *Local 1111 of the United Electrical, Radio and Machine Workers of America v. Allen-Bradley Co.*, 259 Wisc. 609, 49 N.W. 2d 720. (Fritz, Chief Justice; Currie, J., dissenting).

A contract of a union with the Photo-Engravers Board of Trade of New York, which was by its terms for the benefit of union members only, excludes the right of an employee to compel arbitration for a claim arising prior to his joining the union. As the company tendered and is willing to pay the amount claimed for the period subsequent to that date of joinder, a motion to compel arbitration for the prior period was denied. *Snyder v. Klee Photo-Engraving Co.*, N.Y.L.J., October 3, 1952, p. 689, McNally, J.

Challenge of a contract as invalid because of usury requires a trial of that very issue, as this question may not summarily be disposed of. In reversing the decision digested in *Arb. J.* 1952, p. 116, the App. Div. stayed arbitration only pending the trial of the issue of usury. *Schoeffer v. Lowell Adams Factors Corp'n*, N.Y.L.J., October 1, 1952, p. 656.

A defendant, not being a party to an arbitration agreement, cannot assert any rights under it. Said the court: "Arbitration is a matter of contract between the parties thereto and a third party cannot intervene since he is not a party to the contract of arbitration (*Flora Fashions, Inc. v. Commerce Realty Corp'n*, 80 N.Y.S. 2d, 387; *In re Spotswood* (*Santini Storage Corp'n*), N.Y.L.J., March 16, 1945, Special Term, Part I, N. Y. County)." *Dooley v. Witherspoon*, N.Y.L.J., October 9, 1952, p. 759, Eder, J.

In a partnership dispute, the parties were directed to proceed to arbitration, the court stating: "This court has jurisdiction notwithstanding the contract containing the arbitration clause was made in a foreign state and notwithstanding the contract and the disputes between the parties involve a partnership presently doing business in such state. The respondent resides in this county and state, so jurisdiction has been obtained over his person. The remedy afforded by the statutes of this state may be lawfully extended to this contract (see *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284; *Gantt v. Felipe Y. Carlos Hurtado Cia.*, 297 N.Y. 433). There is nothing expressed in the contract, or to be implied

therefrom, barring arbitration proceedings in this state. In fact, the contract provides for the carrying on of the partnership business by the partners at a certain address in the foreign state, 'or at any other place they may hereafter mutually agree to rent for that purpose,' without any express provision that the business was to be confined to the particular state. There is no question but what an action could be maintained in this state as against the respondent upon this contract (except as barred by the arbitration clause), and there is no good reason why this proceeding may not properly be maintained in this forum where the defendant resides and is subject to process." *Matter of Brown*, N.Y.L.J., September 17, 1952, p. 514, Eager, J.

When a party "named an arbitrator pursuant to the provisions of the order compelling arbitration, without reserving any right to question the propriety thereof, he waived his right to object to the order." *A. R. La Mura, Inc. v. Rochelle Arms Apartments, Inc.*, N.Y.L.J., December 9, 1952, p. 1432 (App. Div. First Dept.).

Alleged fraudulent representations which induced the execution of a construction contract is a proper issue for a trial before compelling arbitration. A motion to compel arbitration and to stay a court action based upon the rescission of the contract for fraud authorized an inquiry by Special Term to determine whether the contracts were entered through false representations of an estimate made by the Federal Housing Administration for the labor and materials covered by the contract. *Horowitz v. Alley Pond Apartments No. 1, Inc.*, 280 App. Div. 866, 114 N.Y.S. 2d 110.

A time limit for the naming of the arbitrators, within a seventy-two hour period, does not constitute a time limit within which either of the parties must demand arbitration. Said the court: "The contract is entirely silent as to any time limit within which arbitration must be demanded. Here the demand for arbitration and the naming by the respondent of its arbitrator were both contained in a demand for arbitration, concededly served on a date more than three days subsequent to the amicable attempt toward settlement between the parties as provided in the agreement." A motion for a stay of arbitration was therefore denied. *L. I. Drug Co., Inc. v. Allied Trades Council, A.F.L.*, N.Y.L.J., October 2, 1952, p. 678, Hill, J.

IV. THE ARBITRATOR

Removal of a third arbitrator or umpire, in a dispute between two textile firms, by court order, was reversed by the Superior Court of New Jersey, Appellate Division. The court held that nothing in the arbitration statute permits summary proceedings to remove an arbitrator. Said the court: "Neither statute nor rule authorizes summary proceedings for the alteration or revision of an arbitration agreement by the removal of an arbitrator named therein. Although the Arbitration Act permits summary proceedings to compel a party to an arbitration agreement to proceed with arbitration (N.J.S. 2A: 24–3), or for naming an arbitrator under certain circumstances (N.J.S. 2A: 24–5), it contains no provision permitting summary proceedings to remove an arbitrator." *Aronowitz v. Reyville Textile Corp.*, 21 N.J. Super. 234 (August 28, 1952).

Abandonment of arbitration cannot be found in the refusal of a party to continue arbitration before two arbitrators who were selected by the other party and who were to select an umpire in the event of inability to agree. Charges that improper considerations were permitted to affect the deliberations were, in the opinion of the court, "fully substantiated." The court stayed the proceedings and directed arbitration "anew pursuant to the agreement of the parties. In the event they are unable to agree upon designation of an arbitrator or board of arbitrators the designation will be made by the court." *L. & R. Hewett Const. Corp'n v. Ausnit,* N.Y.L.J., October 29, 1952, p. 986, Aurelio, J.

An umpire in an arbitration of a dispute on accounting between partners merely wanted to join in any agreement reached by the two other arbitrators who had selected him, a friend of both parties, as the third arbitrator. He stated in an affidavit that if he "sided with one or the other, there would be a resulting enmity which I desired, with all my might, to avoid." The court stated that his "function it is to cast the deciding vote . . . as quasi-judical in character, and the arbitrator must act accordingly. *Matter of Friedman,* 215 App. Div. 130, 134." Inasmuch as the arbitrators had not rendered a final decision and the time stipulated in the agreement for rendering the award had passed, an application to compel the execution of an award was denied. *Morelli v. Provenzano,* 115 N.Y.S. 2d 489 (Pette, J.).

V. ARBITRATION PROCEEDINGS

An award was confirmed as "it clearly appears that the contract provided for arbitration in accordance with the rules of the American Arbitration Association and that, pursuant to its rules, the administrator exercised the power to fix the locality of the hearings in New York City. Accordingly, the parties had fixed the place for arbitration and there is no jurisdictional impediment to the entry of judgment." *Maple Yarn Mills, Inc. v. London Knitting Co., Inc.,* October 27, 1952, p. 952, Gavagan, J.

A lease which conveyed property to individuals who composed a partnership provided for arbitration of disputes as to "whether repairs or replacements are necessary." A stay of arbitration which the lessor demanded, on the grounds that the parties must first attempt to agree upon an arbitrator before the matter may be submitted to the American Arbitration Association, was denied by the court which stated: "The lease provides that if the parties cannot agree on arbitrators the dispute is to be submitted for arbitration in accordance with the rules of the American Arbitration Association. Respondent designated an arbitrator and suggested that petitioners designate a second, the two so designated to select a third. Petitioners countered by rejecting respondent's arbitrator and, while resisting any arbitration, suggested that if one were to be had that the same be submitted to a single arbitrator. This conduct on petitioners' part, considered in the light of all the surrounding factors, justified respondent in concluding that no agreement would be possible with petitioners either to arbitrate the controversy or for the selection of arbitrators to whom the controversy might be submitted. Therefore, submission of the controversy for arbitration under the rules of the American Arbitration Association was the only course open to respondent and

is clearly in accordance with the provisions of the lease." *A. & A. Holding Corp. v. Pot Cove Associates,* 116 N.Y.S. 2d 265 (Schwartz, J.).

Bills of lading incorporated "all the terms whatsoever" of the charter party "except the rate and payments of freight." A claim for short delivery was thus an arbitrable issue; said the court: "Since it is so plain that the provisions for arbitration in the charter party were brought into the bills, it is unnecessary to make any distinction in this instance between the two documents." A reservation in the charter party to the carrier of all rights it would have under the Carriage of Goods by Sea Act, 46 U.S.C. 1300, made the demand for arbitration not untimely though it was not made within the one-year limitation upon suits contained in sec. 1303(6) of the Act. Arbitration is not to be considered a "suit" within the terms of statute; it is more the performance of a contract providing for the resolution of controversies without suit. Said the court: "We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined, especially to a ship owner. But unless they see fit to condition their agreement by an express time limitation, a demand within a reasonable time, as here, is not barred." *Son Shipping Co., Inc. v. De Fosse & Tanghe, Solel Boneh, Ltd.,* 21 U. S. Law Week 2232 (Circuit Court, 2d Circ., November 12, 1952, Chase, J.).

Parties' stipulation to submit to AAA arbitration incorporated Rule 40 which provides for rendering the award not later than thirty days from the date of closing of the hearings, and thus abrogated a previous agreement for the rendering of an award "with reasonable dispatch but in no event later than two weeks after conclusion of proof." The Court of Appeals affirmed the decision of the Appellate Division whereby "it was for the arbitrators to determine the procedural limits of the submission." *Franz Rosenthal, Inc v. Tannhauser,* N.Y.L.J., November 24, 1952, p. 1258.

VI. THE AWARD

An employer failed to comply with an award for reinstatement of one of his employees. An order was entered adjudging him in contempt of court, and he was incarcerated in the county jail. During his stay in jail, the union consented to his release only upon condition that he sign a new collective bargaining agreement, which he did. More than six months later he claimed that the agreement containing an arbitration clause was void by reason of duress, but he did not take any steps to rescind it. A motion to stay arbitration, pursuant to section 1458(2) C.P.A., was denied, the court stating: "The law is well settled that imprisonment under legal process, obtained fairly and properly, is not such duress as will avoid a contract or settlement entered into between the person deprived of his liberty and the person at whose instance he is held (17 American Jurisprudence, p. 877; Restatement of Law of Contracts, Vol. II, p. 942; New York Law of Contracts, Vol. 1, p. 129; *Farmer v. Walter,* 2 Edward's Ch. 601; *Fowler v. Fowler,* 197 App. Div. 572)." *Local 853, Retail Furniture & Floor Covering Employees Union, R.W.D.S.U., C.I.O. v. Zimmerman,* N.Y.L.J., October 15, 1952, p. 817, Di Giovanna, J.

An Arbitration Appeal Board under the Rules of the Rubber Trade Association of New York determined in an award that the seller of Thailand rubber be judged in default and the contract "be invoiced back to seller." These words are, in the opinion of the court, "not an expression the meaning of which is ascertainable by reference to any objective, extrinsic standard of which the court can take judicial notice." Under the various possible interpretations which the court considered, the award seems to be "unintelligible on its face and does not form an adequate basis for any judgment." Resort to affidavits of the arbitrators giving their version of what they think their award means, should be avoided in the opinion of the court referring to *Doke v. James,* 4 N.Y. 568; *New York City Omnibus Corp. v. Quill,* 189 Misc. 892. The award was therefore vacated and a rehearing ordered before new arbitrators to be chosen in the manner provided by the contract (C.P.A. sec. 1462). *Imperial Commodities Corp. v. Paul Bertuch Co., Inc.,* N.Y.L.J., October 31, 1952, p. 1021, Walter, J.

Misconstruction of an agreement by the arbitrator, if it exists, is not an "evident miscalculation of figures" or an "evident mistake in the description of a person, thing, or property, referred to in the award," within the meaning of sec. 1462a C.P.A., that would warrant a modification of the award by the court. A motion to modify the award was therefore denied. *In re Five Boro Const. Corp'n,* N.Y.L.J., October 30, 1952, p. 1004, Walter, J.

Pendency of an appeal under arbitration rules providing for such proceedings may delay the confirmation of an award. Said the court: "Although in a technical sense the pendency of an appeal from the award does not destroy its finality, the arbitration was had under rules which permit an appeal and I hence think that orderly practice required that, at least in the absence of some extraordinary circumstances, entry of judgment should await determination of the appeal. If judgment were ever entered on the present award some difficulty might be encountered in getting it vacated in case the present award is reversed or modified as a result of the appeal." *Pober & Solomon, Inc. v. Northfield Mills, Inc.,* N.Y.L.J., October 31, 1952, p. 1021, Walter, J.

An award rendered in an arbitration of a construction dispute provided for the payment by the owner of the balance of $500 upon completion of certain unfinished work by the general contractor "but not later than January 2, 1953." Said the court: "In one breath there is a direction to the owner to pay a certain sum which connotes a finding of full performance by the contractor, and in the next breath the owner is authorized to withhold $500 until completion, and even if the work is not completed payment is directed to be made not later than January 2, 1953. The award is unintelligible and is self-contradictory. It should be vacated (*Application of Perlowin,* 278 App. Div. 348)." The court remanded the matter to the same arbitrators. "Upon the rehearing the arbitrators will be afforded an opportunity to make an intelligible award that is final and definite on the issues before them which are whether the contractor fully performed its agreement, and if so, the amount of money presently due it." *J. R. Stevenson Corp'n v. Flatbush Jewish Center,* N.Y.L.J., September 29, 1952, p. 633, Hart, J.

A fair rental award when confirmed by an order entered in the Supreme Court, is not subject to collateral attack (*Apex Binding Corp'n. v. Relkin,* 198 Misc 381

(digested in *Arb. J.* 1951, p. 56), and must be given effect all the more as no timely attempt (three months, sec. 1463 C.P.A.)—and, indeed, no attempt at all —to set it aside was made (*Raven Elec. Co. v. Linzer,* 302 N.Y. 188). *Endicott Mfg. Corp'n v. West,* N.Y.L.J., October 20, 1952, p. 867, Byrnes, C. J.

When a change of hearings before an arbitrator from Stamford, Connecticut to New York was made with the express understanding of the parties that the change of the locale of the hearings would in no way alter the status of the proceedings as a Connecticut arbitration, then an award rendered in Connecticut was, in the opinion of the N. Y. Supreme Court, subject to the laws of Connecticut, and "should be the subject of enforcement or rejection by the court of that state." (Note: as to the enforcement by New York courts of foreign awards, and not only of judgments entered upon such awards, see *Sargant v. Monroe,* 67 N.Y.S. 2d 591, as modified 268 App. Div. 123). *Landerton Co., Inc. v. Public Service Heat and Power Co., Inc.,* N.Y.L.J. November 12, 1952, p. 1131, Daly, J.

Enforcement of a New York judgment entered ex parte upon an award rendered against a non-resident party, was denied by a Georgia Appellate court, reversing a decision of the Superior Court of December 4, 1951, which gave recognition to the New York judgment. The arbitration clause expressly provided that "the parties consent to the jurisdiction of the Supreme Court of the State of New York in respect to such arbitration, and further consent that any process or notice of motion or other application to the court or a judge thereof may be served outside the State of New York by registered mail or by personal service, provided a reasonable time for appearance is allowed." Nevertheless, the court found that the defendant did not voluntarily appear in person or by an attorney in the New York procedure and that he was not served while within the jurisdiction of the New York court. The court stated: "It is the accepted principle here and elsewhere that a judgment in personam without voluntary appearance or valid service of process within the jurisdiction is void. *Casey v. Barker,* 219 N.C. 465 (14 S.E. 2d 429), and cases cited." (Note: It may be observed that this decision is in contradiction to the many decisions both of Federal and State courts which enforced New York ex parte judgments against non-resident debtors of arbitration awards who had also not participated in the arbitration. (See this Arb. J., 1951, p. 192.) *Lurey v. Jos. S. Cohen & Sons Company, Inc.,* 68 Ga. 356 (June 25, 1952).

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